

San Francisco Law Library

No.


Presented by

.....

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

070
Circuit Judges.
No. 2783

United States
Circuit Court of Appeals
For the Ninth Circuit.

LOUISA PICKENS and JOHANNA SCHUTT,
Appellants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
Southern District of California, Southern Division.

Filed

JUL 1 - 1976

F. D. Monckton,
Clerk

Submitted on briefs

OCT. 4 - 1916

at San Francisco.

2 Briefs.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LOUISA PICKENS and JOHANNA SCHUTT,
Appellants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
Southern District of California, Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Assignment of Errors.....	56
Attorneys, Names and Addresses of.....	1
Bill of Complaint.....	4
Bond on Appeal.....	67
Certificate of Clerk U. S. District Court to Transcript of Record.....	71
Citation on Appeal.....	1
Decree of Dismissal.....	54
Marshal's Return to Subpoena Ad Respondendum.....	34
Memorandum Opinion.....	49
Minutes of Court, March 1, 1915—Order of Submission of Motion to Dismiss Bill of Complaint, etc.....	44
Minutes of Court, March 1, 1915—Order of Submission of Motion to Dismiss Bill of Complaint, etc.....	46
Minutes of Court, August 14, 1915—Order Granting Motion to Dismiss Bill of Complaint, etc.....	48
Motion of Eugene Wellke et al., to Dismiss Bill of Complaint.....	35
Motion of J. H. Merriam to Dismiss Bill of Complaint.....	40

Index.	Page
Names and Addresses of Attorneys.....	1
Opinion.....	49
Order Allowing Appeal and Fixing Amount of Bond.....	62
Order Under Rule 16 Enlarging Time to May 1, 1916, to File Record and Docket Cause.....	73
Petition for Appeal.....	61
Power of Attorney of Globe Indemnity Com- pany.....	63
Praecipe for Transcript of Record.....	70
Schedule A to Bill of Complaint.....	30
Schedule B to Bill of Complaint.....	31
Subpoena ad Respondendum.....	32

Names and Addresses of Attorneys.

For Appellants:

Messrs. DAVIS, KEMP & POST and D. R.
HITE, 812 Marsh-Strong Building, Los
Angeles, California.

For Appellees:

Messrs. HUNSAKER & BRITT, 1132-1143
Title Insurance Bldg., Los Angeles, Cali-
fornia;

and

J. H. MERRIAM, Esq., Union Savings Bank
Bldg., Pasadena, California. [2*]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Citation [on Appeal].

The United States of America to J. H. Merriam,
Eugene Wellke, Alma J. Schmidt, Amanda
Katzung, Minnie S. Farnsworth, Corrine Love-
land and Don Ferguson, Defendants, and to J.
H. Merriam and Hunsaker & Britt their Attor-
neys; Greetings:

*Page-number appearing at foot of page of original certified Record.

You are hereby notified that in the above-entitled case in equity an appeal has been allowed the complainants therein to the United States Circuit Court of Appeals, and you are hereby cited and admonished to be and appear in said court at 30 days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable BENJAMIN F. BLEDSOE, Judge of the United States District Court for the Southern District of California this the 5th day of February, A. D. 1916.

BLEDSOE,

United States District Judge. [3]

[Endorsed]: Copy. No. B-15. In the United States District Court, in and for the Southern District of California, Southern Division. Louisa Pickens et al., Complainants, vs. J. H. Merriam et al., Defendants. Citation. Filed Feb. 14, 1916. Wm. M. Van Dyke Clerk. By Chas. N. Williams, Deputy Clerk.

Received copy of the within citation this 14th day of February, 1916. J. H. Merriam and Hunsaker & Britt, Attorneys for Defendants for Whom we have appeared.

State of California,
County of Los Angeles,—ss.

J. P. Cottrell, Jr., being first duly sworn, deposes and says: That he is and was at all times herein mentioned, a clerk in the office of Davis, Kemp & Post, attorneys for complainants and appellants in the fore-

going and above-entitled action; that on the 14h day of February, 1916, affiant personally delivered a copy of the within citation at the office of Hunsaker & Britt attorneys for defendants, No. 1132 Title Insurance & Trust Building, which is also a copy of the original citation on file in said action.

J. P. COTTRELL, Jr.,

Subscribed and sworn to before me this 14th day of February 1916.

[Seal]

R. R. VEAL.

Notary Public in and for the County of Los Angeles,
State of California. [4]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. B-15—EQUITY.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants. [5]

*In the District Court of the United States for the
Southern District of California, Sitting in the
Southern Division.*

No. B-15—EQ.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Bill of Complaint.

The above-named complainants say:

I.

That the complainant Louisa Pickens is now and has been for many years a citizen and resident of the State of Kansas, living in the city of Topeka, in that State, and that the complainant Johanna Schutt is now and has been for many years a citizen and resident of the State of Nebraska living in the city of Omaha in that State; that the defendants and each of them are citizens and residents of the State of California, and of the Southern District and Division thereof, and the real estate hereinafter described is situated in said State, district and division.

[6]

II.

That the amount in controversy herein exceeds

the sum or value of Three Thousand Dollars (\$3,000), exclusive of interest and costs.

III.

That the complainants are surviving sisters and heirs at law of one Ferdinand Fensky, who died intestate at San Pedro, Los Angeles County, California, on August 7, 1903, and bring this suit to recover their distributive shares of the estate of their deceased brother; that the said Ferdinand Fensky never had any children; that he left other heirs at law, besides the complainants herein, as follows: Jeanette Fensky, his widow (since deceased), Frederick Fensky, a brother, Ida Wendt, a sister (since deceased), Hulda Richter, a sister, Augusta Krauss, a sister, Charles Fensky, a brother and George Fensky, a son of a brother who died during the lifetime of said intestate; that the said Ida Wendt died intestate subsequent to the death of Ferdinand Fensky, leaving a son, Conrad Wendt, as her sole heir at law; that after the death of the said Ferdinand Fensky and of the said Ida Wendt, and some years prior to the beginning of this suit, the said Conrad Wendt died unmarried, intestate and without issue or direct heirs, and each of the complainants as maternal aunt of the said Conrad Wendt succeed to one-seventh ($1/7$) of the interest of the said Ida Wendt in the estate of the said Ferdinand Fensky, and the property hereinafter described.

IV.

That at the time of his death Ferdinand Fensky was the owner of a large amount of real estate, all of which your orators for want of information are

not able to describe, but, so far as [7] known to your orators, is described as follows:

(A) A piece or parcel of land situated in the city of Los Angeles, California, being as follows: Commencing at a point on the West line of New High Street distant 200 feet Southwest from the Southwest corner of Alpine Street and New High Street; thence Southwesterly along the West line of New High Street 73 feet to a point; thence Westerly at right angles to said West line of New High Street 65 feet to a point; thence Northeasterly at right angles to the last-mentioned course parallel with and distant from the West line of New High Street 73 feet to a point; thence 65 feet Easterly to the West line of New High Street to the point of beginning; being parts of Lots 10 and 11 in Block 33, of Ord's Survey, as recorded in Book 55, Page 66, Miscellaneous Records of Los Angeles County, California.

(B) Lots 19 to 29 inclusive in Block 3, Peck's Subdivision of the Carolina Tract in the city of San Pedro, Los Angeles County, California.

(C) Lots 9 and 10 of Peck's Subdivision of Lot 74 in said city of San Pedro, Los Angeles County, California.

(D) The West half of the Southwest quarter of the Northwest quarter of Section 24, Township 5 W., Range 10 S., in Orange County, California.

(E) The Southwest quarter of the Southeast quarter and the South half of the Northwest quarter of the Southwest quarter of Section 4, Township 5 W., Range 10 S., Orange County, California. [8]

V.

That at the time of his death Ferdinand Fensky owned and possessed promissory notes executed by various persons aggregating about \$20,000 in face value and payable to him at various times, as stated in said notes.

A schedule of said notes is hereto attached, marked exhibit "A," and made a part hereof.

On information and belief the complainants aver that the said Ferdinand Fensky owned other promissory notes payable to him and executed by various persons, but for want of information are unable to give a description of the same.

VI.

That at the time of his death various persons were indebted to the intestate on account of the purchase money on real estate sold by him to such persons; that at the times said real estate was sold the intestate executed to said purchasers contracts for deeds whereby he agreed to convey the real estate described therein upon the full payment of the purchase price, and at his death there was unpaid a large amount of such purchase price.

A schedule, showing such indebtedness, so far as known to complainants, is attached hereto, marked exhibit "B" and made a part hereof; that on information and belief complainants aver that other persons were indebted to the said Ferdinand Fensky at the time of his death on account of similar transactions, but for want of sufficient information complainants are unable to give the details of such transactions.

VII.

That complainants are informed and believe that at the time of his death Ferdinand Fensky possessed cash in bank and in the hands of agents and attorneys, amounting to about \$10,000. [9]

III.

That said real estate situated in the city of Los Angeles, California, at the time of intestate's death, was reasonably worth \$2,500; that said real estate owned in San Pedro was then worth about \$14,000; that said real estate in Orange County was then worth about \$10,000; and that the whole of the property and estate owned and possessed by intestate, so far as complainants can ascertain the same, was then worth \$100,000.

IX.

That on October 15, 1903, by the consideration of the Superior Court of Los Angeles County, California, the said Jeanette Fensky was appointed and became administratrix of the estate of her deceased husband; that upon the death of Ferdinand Fensky, the said Jeanette Fensky came into the possession of a large sum of money in cash belonging to her deceased husband, the exact amount of which is to the complainants unknown, but which on information and belief they aver to have been in excess of \$5,000; that she also came into possession of the promissory notes described in Schedule A, attached hereto, and also of other promissory notes, which, for want of information, complainants are unable to describe; and also came into possession of all of the

evidences of indebtedness due to the said Ferdinand Fensky, but which the complaints are unable, for want of sufficient information, more fully to describe; that as such administratrix the said Jeanette Fensky came into possession of the real estate hereinbefore described, in the State of California; that well knowing the value thereof to be as hereinbefore alleged, and designing to deceive and defraud the complainants, and other heirs at law of her deceased husband, she caused the said California real estate to be falsely and fraudulently appraised and inventoried [10] at a total sum of about \$6,000; that instead of returning to said Superior Court a true inventory of said personal property she inventoried but one promissory note for the sum of \$400, and, pursuing said design to mislead and defraud the complainants and other heirs of her deceased husband, purposely failed to list and inventory the said cash belonging to said intestate which came into her possession; also purposely failed to inventory the evidences of indebtedness due to her deceased husband from said purchasers of real estate; and also purposely omitted from said inventory a large amount of other real and personal property, which the complainants for want of information are unable to describe; that said inventory was duly signed by the said Jeanette Fensky as such administratrix and was by her presented to said Superior Court as and for a true inventory of the estate of her deceased husband, when in truth and in fact the same was false and fraudulent as aforesaid, and intended by the said Jeanette Fensky to

deceive the complainants as sisters of her deceased husband into the belief that his estate consisted of nothing but the property therein described and valued, and thereby induce them to relinquish their just claims to their respective shares thereof.

X.

That after the death of Ferdinand Fensky the said Jeanette Fensky, pursuing said design, sent all of said promissory notes and all of the evidences of indebtedness due to her deceased husband, to her agent and representative in the State of Kansas, one M. T. Campbell, who then and now resided and resides at Topeka, in Shawnee County, in that State; and entered into a fraudulent and collusive agreement with him that the said Campbell [11] should act as her agent and representative in obtaining releases from complainants, and pursuant to such agreement, and for the purpose of carrying it out, procured the said Campbell, by virtue of certain proceedings in the Probate Court of Shawnee County, Kansas, a court of record having jurisdiction of the estates of deceased persons, to be and he was on September 9, 1903, appointed as a so-called administrator of the estate of the said Ferdinand Fensky; that on or about October 22, 1903, the said Campbell filed in said Probate Court a pretended inventory represented by him to be "a true inventory of all the goods, chattels, rights and credits of Ferdinand Fensky, deceased, which are by law to be administered in Kansas, and also an inventory of the real estate of Ferdinand Fensky," and showing personal property amounting to \$20,927.64, con-

sisting of \$4,297.14 cash in hand, and a part of the promissory notes described in Schedule A hereof, but wholly failed to list the note signed by W. C. Stein, and the note signed by Simms; that said Campbell purposely omitted from said inventory any reference to the indebtedness due said intestate from said purchasers; that the real estate sold by intestate and for which said purchasers were indebted to him, and, after his death, to his estate, is situated in and near said city of Topeka, and consisted in part of what is known as Fensky's First and Second Additions, about twelve acres in Kaw Reserve No. 5, Lot 61 on Kansas Avenue South, and part of Lot 71 on Kansas Avenue North; that the Kansas law regulating the descent and distribution of property, then as now, provided and provides that real estate of an intestate husband dying without children, descends directly to his widow, and no part of the same descends to his next of kin; that well knowing the provisions of said law and the foregoing facts, and pursuant to said [12] fraudulent design and agreement, the said Jeanette Fensky and the said Campbell listed in said inventory, filed in said Probate Court, the real estate sold by intestate to said purchasers as real estate, and, knowing that none of the contents of sale of said real estate had been recorded, and knowing that complainants had no knowledge that said real estate had been sold, concealed the fact that such real estate had been sold, and by listing the same as real estate falsely represented to complainants that the real estate so sold belonged to said widow under said law and that

complainants had no interest therein; that it was the duty of said widow and of said Campbell under the laws of both California and Kansas, to inventory and account for the indebtedness due from said purchasers as personal assets of said intestate distributable according to the law of California applicable to separate property of a deceased husband dying in that State, without issue, and leaving a widow and brothers and sisters; that for the purpose of carrying out said fraudulent design of securing from complainants by misrepresentation and fraud, a release of their lawful claims against the estate of their deceased brother, the said Jeanette Fensky and the said Campbell concealed the existence of the indebtedness due said estate from said purchasers omitted from both said inventories said indebtedness and stated therein, and otherwise, that said real estate was actually Kansas real estate owned by intestate and as such descended to and belonged solely to said Jeanette Fensky.

XI.

That under the laws of the State of Kansas, then and now in effect, where the vendee in a contract of sale of real estate dies without having executed a deed to the purchaser, upon the [13] payment to the administrator of his estate of the unpaid balance of the purchase money the administrator is authorized, and may be directed by the Probate Court, to execute such deed with the same effect as though it had been executed by the vendor; that some time prior to his death the said Ferdinand Fensky and the said Jeanette Fensky drew up and signed deeds

of conveyance to the several purchasers holding said contracts but did not deliver the same; that all of said undelivered deeds came into the hands of Jeanette Fensky upon the death of her husband; that well knowing that the execution by her or by the said Campbell as administrator of deeds to said purchasers would reveal the fact that said real estate had been sold and that the purchase money constituted personal property of said estate, the said widow and the said Campbell soon after their respective appointments began negotiations with the said purchasers to accept said undelivered deeds notwithstanding the death of said Ferdinand Fensky, and to execute to the said Jeanette Fensky mortgages for the amount of the unpaid purchase money due under said contracts of sale; that substantially all of the purchasers mentioned in Schedule B hereof, accepted said proposition, and, said deeds all of which were dated prior to the death of the said Ferdinand Fensky, were by the said Jeanette Fensky, through the said Campbell, delivered to said purchasers and they executed to the said Jeanette Fensky mortgages for such unpaid balance of the purchase money; that said Jeanette Fensky and the said Campbell, still pursuing the aforesaid fraudulent design, omitted from their inventories in Kansas any reference to said mortgages, and neither the said Jeanette Fensky in her lifetime; nor the said Campbell, nor anyone else, representing the estate of the said Fensky, has accounted to the complainants for any part or share of said mortgages, [14] or the proceeds therefrom,

and the same are as hereinafter related unadministered assets of the estate of the said Ferdinand Fensky, deceased, in which these complainants have an interest as his heirs at law.

XII.

That by means of said inventories filed by said Jeanette Fensky and said Campbell, and otherwise, they represented that the estate of the said Ferdinand Fensky consisted of property situated in California of the value of about \$6,000 and of property in the hands of the said Campbell, amounting to about \$20,000, and represented that of this estate the widow Jeanette Fensky was entitled to one-half and that the remaining half was subject to distribution among the other heirs at law of said intestate, so that, according to the inventories prepared by them, the widow would receive about \$10,000 from the property in the hands of the said Campbell, and about \$3,000 of property in her hands in California, and in addition thereto, that said widow was entitled to the real estate described in Campbell's inventory, situated in the State of Kansas; that in truth and in fact as said Jeanette Fensky and said Campbell well knew, the California real estate owned by said intestate at the time of his death was worth nearly \$30,000 and the personal property in California in the hands of the said Jeanette Fensky was of the value of more than \$50,000, and in truth and in fact the personal property including that which the said Jeanette Fensky turned over to the said Campbell, for such pretended administration, in the State of Kansas, was of the

actual value of nearly \$60,000; that almost immediately after the death of the said Ferdinand Fensky the said Campbell began the collection of moneys due on account of the promissory notes set out in Schedule A, and also moneys due from said purchasers; [15] and prior to July, 1904, the said Campbell had collected of assets belonging to the estate of the said intestate, either in cash or in available mortgage notes, well secured, more than \$15,000; that from time to time the said Campbell, without the knowledge or consent of the complainants, remitted to said Jeanette Fensky large sums of money and retained other large sums of money in his hands for the purpose of carrying out the aforesaid design of securing for the said Jeanette Fensky the shares of the estate of their deceased brother, to which these complainants were justly entitled, that within a short time after the appointment of the said Campbell as such administrator, he represented to the complainants that it would take a long time to close up the estate of the said Ferdinand Fensky; that many of the promissory notes inventoried by him were of little or doubtful value; that the makers of said notes were accustomed to taking time for the payment of the same; that the costs of administration would amount to a considerable sum and that even if he should be able to collect said notes, that the shares of said estate to which each of the complainants ultimately might be entitled would not exceed the sum of \$1,000; that the said Campbell further represented that the real estate in and near Topeka, Kansas, all went to the widow; that the property left

by intestate was community property, to which the said Jeanette Fensky was entitled to one-half absolutely; and that if they wanted their shares, the said Jeanette Fensky would buy from the complainants their claims against said estate for \$1,000 each; that each and all of said representations were false, fraudulent and misleading, and were by the said Campbell and the said Jeanette Fensky, known to be false, fraudulent and misleading; that the said promissory notes were all good; that said intestate left no debts and there was no just reason why the estate should not be closed and final distribution made [16] within a reasonable time; that the amount which each of the complainants was entitled to receive from said estate, upon a full disclosure and accounting, was more than \$8,000; that the said property left by said intestate was not community property, but was his separate property; that the costs of administration ought to have been comparatively small, and not exceeding the amount authorized by law; that the value of the estate was nearly \$100,000, instead of about \$26,000, as represented by said Campbell and said widow; that at the time the aforesaid representations were made these complainants had no knowledge of the actual facts as herein stated, but relied upon said inventories and the said representations made to them, and, believing the same, the complainant Louisa Pickens, on or about July 29, 1904, accepted the sum of \$1,000 then paid to her by the said Campbell, and executed, and delivered to him for the said Jeanette Fensky, all of the right, title and interest of the said Louisa

Pickens, in and to the property and estate of her said deceased brother; and on or about August 3, 1904, the complainant Johanna Schutt, relying upon and believing the said inventories and the said representations made to her, accepted *to* sum of \$1,000 then paid to her by the said Campbell, and executed and delivered to him for the said Jeanette Fensky, a similar release and quitclaim releasing and conveying unto the said Jeanette Fensky all of the right, title and interest of the complainant Johanna Schutt in and to the property, assets and estate of her said deceased brother; that the \$1,000 so paid to each of the complainants as their full share of said estate, and for which they executed said releases and quitclaim deeds, is all that either of the complainants ever received from the estate of their deceased brother; that said sums were so paid to the said complainants by the said Campbell [17] out of funds in his hands collected from the assets of the said estate; that the said Jeanette Fensky did not advance or pay anything whatever for said releases and quitclaims; that the \$1,000 each received by said complainants was only a part of the money then due to them respectively from said estate and the said Jeanette Fensky parted with nothing of value for said releases and quitclaims; that said instruments, and each of them, are ineffective and without consideration and are wholly fraudulent and void, for that, the same were secured from these complainants, and each of them, upon the faith of the aforesaid false, fraudulent and misleading-misrepresentations, statements and representations,

made by the said Jeanette Fensky and the said Campbell; that if the complainants had known or had any suspicion of the truth, neither of them would have executed said release and quitclaim, but would have insisted upon receiving their full share of said estate.

XIII.

That prior to March 30, 1905, the said Campbell, remitted to the said Jeanette Fensky about \$35,000 in cash and secured notes, being proceeds of the assets of the estate of the said intestate which came into his hands; that on or about March 30, 1905, the said Jeanette Fensky filed in the Superior Court of Los Angeles County, California, a pretended final account, in which she represented that she had secured the interest of all the brothers and sisters and other heirs at law of her deceased husband, and that she was the only one entitled to said estate; that there being no debts due from the said intestate, and no opposition to said pretended final account, the same was received and approved by said Superior Court and an order entered discharging the said Jeanette Fensky as such administratrix, and [18] closing said estate; that said Jeanette Fensky thereupon caused said deeds of release and quitclaim to be filed of record in Los Angeles County, and in Orange County, California, and upon the faith of the same secured purchasers of the property in Orange County, California, and also of some of the property in San Pedro, California, realizing therefrom more than \$26,000; that with the money and mortgages received from the said Campbell in the

circumstances aforesaid, and the money derived from the sale of said California real estate, the said Jeanette Fensky purchased real estate in Los Angeles County, California, and at the time of her death in 1909 was the owner of the following described real estate, to wit:

Item 1.

The North 66 feet of the East 200 feet of Lot 80, L. H. Michner's Subdivision of the North 38 acres in Block U of Painter & Ball's Addition to Pasadena, California;

Item 2.

Lot 6 in Block A New Fair Oaks Avenue Tract, Pasadena, California.

Item 3.

Lot 12 of A. F. Mill's Subdivision of the North half of Lot 6 of the Berry & Elliott Tract, Pasadena, California.

Item 4.

That portion of Lot "O" of the San Pasqual Tract in Pasadena, California, described as follows: Beginning at a point in the East line of Lot Four, distant one hundred thirty-two feet South from the Northeast corner thereof; thence West parallel with the North line of said lot two hundred feet to the [19] East line of Magnolia Avenue one hundred feet; thence East parallel with the North line of said lot two hundred feet to the East line thereof; thence along the last-mentioned line one hundred feet to the place of beginning.

Item 5.

Lot 2 of the F. E. Crawford Tract in Pasadena, California.

Item 6.

Lot 16 of S. H. Doolittle's Subdivision of Lot 21 of B. F. Ball's Subdivision of Pasadena, California.

Item 7.

Lot 10 Peck's Subdivision of Block 74 in San Pedro, California.

Item 8.

A piece of property on New High Street, in the city of Los Angeles, County of Los Angeles, State of California, described as follows: Commencing at a point on the West line of New High Street, distant 200 feet Southwest from the Southwest corner of Alpine Street and New High Street; thence Southwesterly along the West line of New High Street 73 feet to a point; thence Westerly and at right angles to said West line of said New High Street 64 feet to a point; thence Northeasterly and at right angles to said last-mentioned course and distant and parallel with the West line of New High Street 73 feet to a point; and, thence Easterly by a straight line 65 feet to the West line of New High Street to point of beginning or commencement, being parts of lots 10 and 11, in Block 33 of Ord's Survey, according to the map in Book 53, Page 68, Miscellaneous Records of Los Angeles County, California. [20]

Item 9.

The portion of Lot 21 of A. F. Mill's Subdivision of the North half of Lot 6 of the Berry & Elliott Tract in Pasadena, California, beginning at the Northwest corner of said lot; thence East along the South side of Colorado Street 25 feet; thence South one hundred thirty-two and seventy-five hundredths

feet to an alley; thence West 25 feet; thence North one hundred and thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five hundredths feet wide off the North side, now a part of Colorado Street.

Item 10.

The South fifty feet of the North one hundred feet of Lot Eight, and the South fifty feet of the North one hundred feet of the West ten feet of Lot Seven of L. A. Michner's Subdivision of Lots Fourteen to Seventeen both inclusive of the Summit Avenue Tract, in Pasadena, California.

Item 11.

Lot 24 of Mary H. Newton Tract in Pasadena, California.

Item 12.

Lot 7 in Block A of G. Weingarth's Subdivision B of the San Gabriel Orange Association lands in Pasadena, California.

That prior to her husband's death the said Jeanette Fensky had no money or property, whatever, and all the property, including the said Pasadena real estate, owned by her at the time of her death, was acquired by the use of money and assets belonging to her husband's estate, and which came into her hands in the circumstances hereinbefore alleged.

[21]

XIV.

That the said Jeanette Fensky died on July 8, 1908; that prior to her death and on or about September 18, 1907, the said Jeanette Fensky, without any consideration therefor, executed and delivered a

deed purporting to convey the property hereinbefore described, situated on New High Street in the city of Los Angeles, California, to the defendant Amanda Katzung; and on the same day, without consideration, executed a deed purporting to convey to said Amanda Katzung said Lot 10 in Peck's Subdivision of San Pedro, California; that at or about the same time, without consideration, the said Jeanette Fensky executed a deed purporting to convey to the defendant Eugene Wellke, real estate situated in the State of Kansas; that with the funds received from the said Campbell, in the circumstances hereinbefore related, and with the funds arising from the sale of said Orange County property, the said Jeanette Fensky, on or about May 28, 1907, purchased the North sixty feet of the East two hundred feet of Lot 8 in Michner's Subdivision of the Northeast 38.86 acres in Block U. T. & B. Addition to Pasadena, California, and on the same day signed a deed purporting to convey to the defendant Alma J. Schmidt, said last-mentioned property; that on or about August 1, 1908, on the petition of the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt, the defendant J. H. Merriam was appointed by the Superior Court of Los Angeles County, California, administrator of the estate of the said Jeanette Fensky; that in said petition it is alleged that the whole of the property of the said Jeanette Fensky at the time of her death consisted of about \$2,300 in money; that for some time after his appointment the said J. H. Merriam took no steps whatever looking to the administration [22] of the estate, but on Septem-

ber 8, 1909, he filed in said matter a pretended inventory from which it appears that the total assets of the estate of the said Jeanette Fensky amounted to about \$3,500, consisting of \$2,324.38 in money, a claim against the defendant Amanda Katzung and a note of the defendant Don Ferguson, amounting to \$1,050; that upon the coming in of said inventory and on September 8, 1909, the defendant J. H. Merriam filed a purported final account of said estate, and in said purported final account represented that property of the intestate in course of administration in the Probate Court of Shawnee County, Kansas, had been wholly administered and distributed; and further represented that the said Jeanette Fensky left as her sole heirs at law the defendants Eugene Wellke, Amanda Katzung, and Alma J. Schmidt;

Complainants aver that at the time the said pretended final account was filed by the said J. H. Merriam, he knew that the said Jeanette Fensky at the time of her death owned the real estate hereinabove described; and knew that the same was distributable among the heirs at law of Ferdinand Fensky, the deceased husband of the said Jeanette Fensky, and knew that neither the said Eugene Wellke, nor the said Amanda Katzung, nor the said Alma J. Schmidt had any interest whatsoever in the same; that as the said Merriam well knew, some time prior to her death the said Jeanette Fensky made out and signed deeds purporting to convey the property owned by her as follows:

A deed to Alma J. Schmidt of the real estate described herein as Item 1 of the real estate owned by

Jeanette Fensky at the time of her death;

A deed to Eugene Wellke of the real estate described in Item 2; [23]

A deed to Minnie S. Farnsworth of the real estate described in Item 3;

A deed to the defendant Eugene Wellke of the real estate described in Item 4;

A deed to the defendant Amanda Katzung of the property described in Item 5;

A deed to the defendant Alma J. Schmidt of the real estate described in Item 6;

A deed to the defendant Amanda Katzung of the real estate described in Item 7;

A deed to the defendant Amanda Katzung of the property described in Item 8;

A deed to the defendant Eugene Wellke of the real estate described in Item 9;

A deed to the defendant Corrine Loveland of the property described in Item 10;

A deed to the defendant Eugene Wellke of the property described in Item 11;

A deed to the defendant Eugene Wellke of the property described in Item 12;

That all of said deeds so made out by the said Jeanette Fensky were not delivered to the respective grantees named therein until after the death of the said Jeanette Fensky; that the title and ownership of said property did not pass to the said grantees; and, at the time of her death the said Jeanette Fensky was the owner of the same; that the said J. H. Merriam well knowing all the foregoing facts, wholly omitted said property from his inventory and ac-

counts, and pretended to make [24] distribution of the estate of the said Jeanette Fensky, and paid over to each of the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt, \$235.61, out of the assets and also turned over to them certain notes belonging to the said Jeanette Fensky, and certain property, which these complainants are unable more particularly to describe; On information and belief complainants aver that the said J. H. Merriam while pretending to act as administrator of the estate of the said Jeanette Fensky, was employed by and acted as attorney and agent for, the defendants Eugene Wellke, Amanda Katzung, Corrine Loveland, Minnie S. Farnsworth, and Alma J. Schmidt, with full knowledge of the rights of the complainants herein, and with the purpose and design of preventing them from securing their just share of said estate of their deceased brother; that the said J. H. Merriam, although requested so to do, has made no effort to represent said estate, and have the administration thereof continued by said Superior Court of Los Angeles County, California, and has failed, refused and neglected to further administer the same, and pretends to deny the rights of these complainants in respect thereof.

XV.

That all of the estate of the said Ferdinand Fensky was his separate property, and as such upon the death of his widow, the said estate and its avails, descended ratably to the surviving brothers and sisters of the said Ferdinand Fensky, and not to the sisters and brother of said Jeanette Fensky; that these com-

plainants have not received from the estate of their deceased brother anything, except the said \$1,000 each, paid to them by the said M. T. Campbell in the circumstances hereinbefore related; that the defendant Minnie S. Farnsworth is a daughter of [25] the said defendant Eugene Wellke, and claims to be the owner of the property described in Item 3 by virtue of said undelivered deed; that the defendant Don A. Ferguson, by virtue of a deed executed to him by Jeanette Fensky, claims to be the owner of the real estate described in Item 3 hereof; that Corrine Loveland claims an interest in the real estate described in Item 10 hereof, by virtue of an undelivered deed as hereinbefore alleged; that whatever right, title or interest the defendants or either of them have or claim to have in any of said property of the said Jeanette Fensky, is subject to the claims of these complainants as heirs at law of the said Ferdinand Fensky, and of the said Jeanette Fensky, both deceased.

XVI.

Complainants aver that until late in the summer of 1912, they did not, nor did either of them, have any notice, knowledge or suspicion of the truth respecting the amount, extent and value of the estate of their deceased brother, nor of the frauds and fraudulent conduct of the said M. T. Campbell, the said Jeanette Fensky, and the said J. H. Merriam, nor did either of them have any notice, knowledge or suspicion of the truth respecting the undelivered deeds made by the said Jeanette Fensky in her life time, to the defendants herein, as heretofore stated;

that during the month of July, 1912, one of the daughters of the complainant Louisa Pickens, while visiting in Los Angeles, California, accidentally secured access to the correspondence between the said M. T. Campbell and the said Jeanette Fensky, which disclosed to said daughter a part of the truth relative to the estate of Ferdinand Fensky, and the dealings of the said Campbell and the said Jeanette Fensky in reference thereto; that the undelivered [26] deeds signed by the said Jeanette Fensky were recorded a few days after her death, but were made and acknowledged several months before she died; that until in the early part of 1913, neither of the complainants had any notice or knowledge that said deeds were not delivered during the life time of Jeanette Fensky, although the complainants had knowledge of the contents of the inventories filed by the said Campbell, the said Jeanette Fensky and the said Merriam; that these complainants, through their children and otherwise, during the pendency of the proceedings in said Probate Court of Shawnee County, Kansas, and during the pendency of the proceedings in the Superior Court of Los Angeles County, California, involving the administration of the estate of the said Ferdinand Fensky and of the said Jeanette Fensky, paid attention to said proceedings, and from time to time secured copies of papers that were filed therein; that none of said papers and none of the records disclosed the truth as your complainants now aver it to be, and their present knowledge concerning the extent and value of the estate of their deceased brother, and

of the facts relating to the estate of the said Jeanette Fensky has been secured since the discovery of the correspondence between the said Campbell and the said Jeanette Fensky, which aroused the suspicion of complainants and caused them to and they have used extraordinary efforts to learn the facts. And complainants aver that they believed the statements contained in the said inventories and believed the representations made to them by the said Jeanette Fensky, and by the said Campbell and by the said Merriam; and aver that except for such representations they would not have released the estate of said Ferdinand Fensky from their just claims, but would have enforced the same. [27]

The premises considered, the complainants pray as follows:

1.

That an account be taken of all of the property of the said Ferdinand Fensky, deceased, owned or possessed by him at the time of his death, and that it be determined and adjudged by this Court that the same was his separate estate and distributable as such under the laws of the State of California.

2.

That the pretended deeds of release and quitclaim executed by these complainants to the said Jeanette Fensky be declared fraudulent and void, and of no effect and that the same be adjudged not to estop these complainants or either of them from claiming their respective shares of the estate of the said Ferdinand Fensky.

3.

That an account be taken of the property and estate of the said Jeanette Fensky and the sources from which the same was derived, and that upon final hearing it be determined that all of the property owned by her at the time of her death is distributable among the heirs at law of the said Ferdinand Fensky, deceased; and that neither the defendant Eugene Wellke nor the defendant Amanda Katzung nor the defendant Alma J. Schmidt, have any interest whatsoever in said property or any part of the same.

4.

That it be determined by this court that the pretended deeds under which the defendants Wellke, Katzung, Schmidt, Farnsworth, Ferguson and Loveland claim, are wholly invalid and void, and that neither of said persons has any right, title or interest whatever in, to, or about the said estate, or any part of the same. [28]

5.

That the defendant J. H. Merriam be required to account to these complainants for their distributive shares of the estate of the said Jeanette Fensky, which came into his hands and which was by him distributed to the said Wellke, Katzung and Schmidt.

6.

The complainants pray that in the event it shall be ascertained by the Court, upon further proceedings herein, that other persons have or claim to have some interest in the estate of the said Ferdinand Fensky, that these complainants have leave to bring in said persons, and that any other heirs at law of the

said Ferdinand Fensky, applying therefor, may be made parties hereto, to the end that the rights of all of the persons having or claiming to have any interest in said estate, may be ascertained and determined.

7.

The complainants pray for such other, further and general relief as to the Court may seem equitable and just.

DAVIS, KEMP & POST,
D. R. HITE,

Solicitors for Complainants. [29]

Schedule A [to Bill of Complaint].

						Amount.
1.	A note signed by one	Stein				\$2,400 00
2.	" " " " "	Simms				325 00
3.	" " " " "	M. & C. Millice				1,500 00
4.	" " " " "	J. W. & E. Rigdon				30 50
5.	" " " " "	A. & J. Bauch				200 00
6.	" " " " "	J. A. & B. Lukens				100 00
7.	" " " " "	Lukens Bros. & their wives				900 00
8.	" " " " "	W. R. Mitchell & wife				2,000 00
9.	" " " " "	H. & H. & F. & E. & H. Buchannan				1,500 00
10.	" " " " "	W. C. & V. Stadel				100 00
11.	" " " " "	" " " " "				250 00
12.	" " " " "	M. & J. W. Strump				165 00
13.	" " " " "	E. & A. Wardell				1,350 00
14.	" " " " "	J. & K. Petri				400 00
15.	" " " " "	John Coster				1,500 00
16.	" " " " "	J. & L. Bauch				300 00
17.	" " " " "	J. H. Foucht				800 00
18.	" " " " "	A. J. Hutchinson				550 00
19.	" " " " "	John Sheetz				400 00
20.	" " " " "	E. D. Jones & wife				500 00
21.	" " " " "	F. A. Root & wife				500 00
22.	" " " " "	J. E. & L. Bauch				700 00
23.	" " " " "	G. & L. & G. Stokes				700 00
24.	" " " " "	P. Hamschild & wife				150 00

Schedule B [to Bill of Complaint].

Showing date of contract of sale, name of purchaser, description of property sold in Topeka, Kansas, amount of purchase price, and amount unpaid at time of Ferdinand Fensky's death.

Date.	Purchaser.	Property Sold Fensky's Addition. Lots.	Street.	Purchase Price	Amt. Unpaid.
11 15 00	M. Etzel	9, 10	Locust	704 00	514 00
11 15 01	John Sell	48, 50	Lake	715 00	598 00
11 15 01	Jos. Walker	35, 37, 39	Locust	1209 45	684 00
7 10 00	John Dietz	9, 11	Lake	500 00	243 00
8 1 01	G. A. Baxter	28, 30, 32	Lake	915 00	696 00
9 15 01	E. H. Stamm	24, 26	Lake	200 00	110 00
8 1 01	Louis Schaeffler	60, 62	Lake	915 00	969 00
8 1 01	George Hammerick	18, 20, 22	Lake	800 00	587 18
8 1 01	A Meder.	23, 25, 27	Locust	630 00	525 00
8 1 01	John Donne	12, 14	Chandler	840 00	745 00
8 1 01	George Brosamer	65, 67, 69	Locust	1500 00	1089 00
8 1 01	Reed Saylor	19, 21	Locust	900 50	860 00
8 1 01	W. L. Haven	42, 44, 46	Lake	970 00	750 00
8 1 01	C. Van Laeys	51, 53	Locust	800 00	615 00
8 1 01	George Lippert	48, 50	Chandler	660 00	300 00
8 1 01	B. S. Dustin	62, 64	Chandler		275 00
8 1 01	M. G. Tracy	47, 49, 51	Lake		510 00
8 1 01	J. H. Brosamer	64, 66, 68			
		& 70	Lake		800 00
8 1 01	Jacob Fink	41, 43, 45	Lake		209 00
8 1 01	M. S. Grant	25, 27	Lake		640 00
[31]					
8 1 01	Wesley Sagar	12, 14, 16	Lake		860 00
8 1 01	John H. Sell	48, 50	Lake		1040 00
8 1 01	George Jammer	29, 31, 33	Lake		912 00
8 1 01	Frank Gutsch	52, 54	Lake		660 00
8 1 01	Casper Gettig	9, 11	Locust		450 00
8 1 01	Sarah Rost	61	Kan. Ave.		4200 00
8 1 01	H. S. Priessuer	71	Kan. Ave.		2200 00
8 1 01	W. E. Gibbons	6, 8, 10	Lake		900 00
8 1 01	Henry Franks	1, 3	Locust		540 00
8 1 01	Frank Sawyer	1, 3	Lake		430 00

[32]

[Endorsed]: Original. No. B-15—Eq. In the District Court of the United States, for the Southern District of California, Sitting in the Southern Division. Louisa Pickens and Johanna Schutt, Complainants, vs. J. H. Merriam, et al., Defendants. Bill of Complaint. Filed Jul. 8, 1914. Wm. M. Van Dyke. Clerk. By R. S. Zimmerman, Deputy Clerk. Davis, Kemp & Post, D. R. Hite, Solicitors for Complainants. 812 Marsh-Strong Bldg., Los Angeles. [33]

[Subpoena ad respondendum.]

UNITED STATES OF AMERICA.

District Court of the United States Southern District of California, Southern Division.

IN EQUITY.

The President of the United States of America,
Greeting:

To J. H. Merriam, Eugene Wellke, Alma J. Schmidt;
Amanda Katzung; Minnie S. Farnsworth, Corrine Loveland and Don Ferguson.

YOU ARE HEREBY COMMANDED, that you be and appear in said District Court of the United States aforesaid, at the courtroom in Los Angeles on or before the twentieth day, excluding the day of service, after service of this subpoena upon you, to answer a Bill of Complaint exhibited against you in said court by Louisa Pickens and Johanna Schutt who are citizens of the State of Kansas and Nebraska respectively and to do and receive what the said Court shall have considered in that behalf. And this

you are not to omit, under the penalty of five thousand dollars.

WITNESS, The Honorable OLIN WELLBORN, Judge of the District Court of the United States, this eighth day of July in the year of our Lord one thousand nine hundred and fourteen and of our Independence the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,
Clerk.

By R. S. Zimmerman,
Deputy Clerk. [34]

Memorandum pursuant to Rule 12, of Rules of Practice for the Courts of Equity of the United States, Promulgated by the Supreme Court, November 4, 1912.

On or before the twentieth day after service of the subpoena, excluding the day thereof, the defendant is required to file his answer or other defense in the clerk's office; otherwise the Bill may be taken *pro confesso*.

WM. M. VAN DYKE,
Clerk.

By R. S. Zimmerman,
Deputy Clerk.

To the Marshal of the United States, for the Southern District of California:

Pursuant to Rule 12, the within subpoena is returnable into the clerk's office twenty days from the issuing thereof.

Subpoena issued July 8th, 1914.

WM. M. VAN DYKE,
Clerk.

By R. S. Zimmerman,
Deputy Clerk.

[Endorsed]: Marshal's Civil Docket No. 2466. No. B-15—Equity. U. S. District Court, Southern District of California, Southern Division. In Equity. Louisa Pickens et als. vs. J. H. Merriam, et al. Subpoena. Filed Jul. 17, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [35]

[Marshal's Return to Subpoena ad Respondendum.]

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY, that I received the within Writ on the 8th day of July, 1914, and personally served the same on the —— day of ———— 19—, on Minnie S. Farnsworth 7/9, Eugene *Willke* 7/9, Alma J. Schmidt 7/10, Amanda Katzung 7/9, by delivering to and leaving with Minnie S. Farnsworth, Eugene *Willke*, Amanda Katzung, and Chas. F. Schmidt, husband of Alma J. Schmidt, *Corine* Loveland and Don Ferguson out of district. Said defendants named therein, personally, at the county of LA. in said District, a copy thereof.

C. T. WALTON,
U. S. Marshal.

By Dolph S. Bassett,
Deputy.

Los Angeles, July 17th, 1914. [36]

**[Motion of Eugene Wellke et al. to Dismiss Bill of
Complaint.]**

*In the District Court of the United States for the
Southern Division of California, Sitting in the
Southern Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM et. al.,
Defendants.

Now comes the defendants, Eugene Wellke and Minnie S. Farnsworth, Alma J. Schmidt, and on the records, pleadings and files in said cause, move the court to dismiss the plaintiffs' complaint, upon the following grounds, to wit:

1. That it appears on the face of said complaint by plaintiffs' own showing, that they are not entitled, nor is either of them entitled to the relief prayed for by the complaint against this defendant, nor to any relief arising from the facts alleged in said complaint.

2. That it appears on the face of said complaint that this court has no jurisdiction to hear and determine this suit.

3. That it appears on the face of said complaint that this court has no jurisdiction of the subject matter of this suit.

4. That it appears on the face of said complaint that said complaint of the plaintiffs is wholly without equity.

5. That it appears on the face of said complaint that there is a nonjoinder of parties defendant therein, in this [37]

That M. T. Campbell, the only surviving participant in the alleged fraudulent acts and concealments, primarily relied upon in said complaint, is not joined as a party defendant therein.

6. That it appears on the face of said complaint there is a misjoinder of causes of action set forth therein, in this:

(a) That an alleged cause of action against these movants as heirs and distributees of the estate of Jeanette Fensky, deceased, is united and mingled with an alleged cause or alleged causes of action against other persons who were not heirs nor distributees of said Jeanette Fensky, and with whom no privity with these movants or either of them is shown or alleged.

(b) That an alleged cause of action against these movants as heirs and distributees of the estate of Jeanette Fensky, deceased, is united and mingled with an alleged cause of action against one who acted as administrator of said estate, based upon his acts as such administrator, and with whom no privity with these movants or either of them is shown or alleged.

7. That it appears on the face of said complaint that plaintiffs' supposed cause of action against these defendants and each of them is barred by the provisions of Subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

8. That it appears upon the face of said complaint

that plaintiffs' supposed cause of action against these defendants and each of them is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

9. That it appears upon the face of said complaint that the causes of complaint are stale and that so long a time has [38] passed since the matters and things complained of took place that it would be contrary to equity and good conscience for this Court to take cognizance thereof or to enforce any further or other answer thereto.

10. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue if it accrued at all, to plaintiffs within five years before the bringing of this suit.

11. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue, if it accrued at all, to plaintiffs within four years before the bringing of this action.

12. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue if it accrued at all, to plaintiffs within three years before the bringing of this action.

13. That it appears on the face of said complaint that the same is uncertain in each of the following respects, to wit:

(a) That it cannot be ascertained therefrom whether the plaintiffs or either of them had, prior to the sale and transfer to Jeanette Fensky, of their

interests in the estate of Ferdinand Fensky, any actual knowledge of any of the alleged sales of real estate;

(b) That it cannot be ascertained therefrom whether the deeds described in Paragraph XI or any of them, were recorded, prior to the sale and transfer to Jeanette Fensky of the interests of the plaintiffs in the estate of Ferdinand Fensky, nor whether the alleged purchasers, or any of them were then in possession of the land sold.

(c) That it cannot be ascertained therefrom what, if any, part of the Kansas real estate had not been sold. [39]

(d) That it cannot be ascertained therefrom what was the value of the real estate or personal property in California, set apart to the widow as a homestead or as exempt property, if any.

(e) That it cannot be ascertained therefrom whether the California property of Ferdinand Fensky or any of it was community property, nor whether it was shown to be so in the inventory.

(f) That it cannot be ascertained therefrom what papers or records, filed in the various administration proceedings described in plaintiffs' complaint are alleged to have failed to disclose the truth, nor in what respects or particulars they so failed.

(g) That it cannot be ascertained therefrom what representations or statements were made in the inventories in said administration proceedings upon the various estates or in any of such inventories nor which of such representations or statements were believed by the plaintiffs, nor which, thereof, if any

were false, nor what were the facts, if any, showing them to be so.

14. That it appears on the face of said complaint that the same is unintelligible in each of the same respects in which it is hereinbefore alleged to be uncertain.

15. That it appears on the face of said complaint that the same is ambiguous in each of the same respects in which it is hereinbefore alleged to be uncertain.

WHEREFORE, and for divers other good reasons of objection appearing upon the face of said complaint, this plaintiff prays the judgment of this honorable court, whether he shall be compelled to make further or any answer to the said complaint, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

J. H. MERRIAM,

Solicitor for Defendants.

Eugene Wellke and Minnie S. Farnsworth. [40]

[Endorsed]: No. B-15. In the District Court of the United States, State of California, Southern Division. Louisa Pickens, et al., Plaintiffs, vs J. H. Merriam, et al., Defendants. Motion to Dismiss. Service of the Within Motion to Dismiss is hereby admitted this 26th day of August, 1914. D. R. Hite and Davis, Kemp & Post, Attorneys for Plaintiffs. J. H. Merriam, Union Savings Bank Bldg., Pasadena, California, Attorney for Defendants Eugene Wellke and Minnie S. Farnsworth. Filed Aug. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [41]

[**Motion of J. H. Merriam to Dismiss Bill of
Complaint.**]

No. B-15—IN EQUITY.

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA J.
SCHMIDT, AMANDA KATZUNG, MINNIE
S. FARNSWORTH, CORRINE LOVELAND
and DON FERGUSON,

Defendants.

Now comes the defendant, J. H. Merriam, and, on the records, pleadings and files in said cause moves the Court to dismiss the plaintiffs' complaint on the following grounds:

1. That it appears on the face of said complaint, by plaintiffs' own showing, that they are not entitled, nor is either of them entitled, to the relief prayed for by the complaint against this defendant, or to any relief arising from the facts alleged in said complaint.

2. That it appears on the face of said complaint that this court has no jurisdiction to hear and determine this suit.

3. That it appears on the face of said complaint that this court has no jurisdiction of the subject matter of this suit. [42]

4. That it appears on the face of said complaint that said complaint of the plaintiffs is wholly without equity.

5. That it appears on the face of said complaint that there is a misjoinder of parties defendant in that movant, J. H. Merriam, is improperly united as a defendant with the other parties named as defendants in this suit.

6. That it appears on the face of said complaint that there is a misjoinder of causes of action set forth in said complaint in this:

(a) That an alleged cause of action against this movant, based upon his acts as administrator of the estate of Jeanette Fensky, deceased, is united and mingled with an alleged cause of action against the persons to whom the estate of said Jeanette Fensky was distributed.

(b) That an alleged cause of action against this movant, based upon his acts as administrator of the estate of Jeanette Fensky, deceased, is united and mingled with alleged causes of action against persons who were neither heirs, distributees or creditors of said estate and with whom no privity with this movant is shown or alleged.

7. That it appears on the face of said complaint that plaintiffs' supposed cause of action against this defendant is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California.

8. That it appears on the face of said complaint that plaintiffs' supposed cause of action against this

defendant is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California.

9. That it appears on the face of the complaint that the causes of complaint are stale, and that so long a time has passed [43] since the matters and things complained of took place that it would be contrary to equity and good conscience for this Court to take cognizance thereof or to enforce any further or other answer thereto.

10. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue, if it accrued at all, to plaintiffs within five years before the bringing of this suit.

11. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue, if it accrued at all, to plaintiffs within four years before the bringing of this suit.

12. That it appears on the face of said complaint and from the allegations therein that the right of action set up in said complaint did not accrue, if it accrued at all, to plaintiffs within three years before the bringing of this suit.

13. That it appears on the face of said complaint that the same is uncertain in each of the following respects, to wit:

(a) That it cannot be ascertained therefrom which, if any, of the papers or records in the administration proceedings in California upon the estate of Jeanette Fensky, deceased, are alleged to have failed to disclose the truth, nor in what respects, if at all,

they or any of them so failed.

(b) That it cannot be ascertained therefrom what statements, if any, were contained in the inventory returned in the administration proceedings in California, upon the estate of Jeanette Fensky, deceased, nor which, if any, of such statements were believed by the plaintiffs, nor which, if any, of such statements were false, nor what were the facts or circumstances showing them to be so. [44]

(c) That it cannot be ascertained therefrom what representations, if any, are alleged to have been made by this defendant to the plaintiffs, nor which such representations, if any, were believed by the plaintiffs thereof, if any, were false, nor what facts or circumstances showed them to be so.

14. That it appears on the face of said complaint that the same is unintelligible in the same respects in which it is hereinbefore alleged to be uncertain.

15. That it appears on the face of said complaint that the same is ambiguous in the same respects in which it is hereinbefore alleged to be uncertain.

WHEREFORE, and for divers other good causes of objection appearing on the face of said complaint, this defendant prays the judgment of this Honorable Court whether he shall be compelled to make further, or any, answer to the said complaint, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

WM. J. HUNSAKER,
E. W. BRITT,

Solicitors for Defendant J. H. Merriam.

[Endorsed]: Original. No. B-15—In Equity. In the United States District Court, Southern District of California, Southern Division. Louisa Pickens, et al., Complainants, vs. J. H. Merriam, et al., Defendants Motion to Dismiss. Service of the Within. Motion to Dismiss is hereby admitted this 26th day of August, 1914. D. R. Hite and Davis, Kemp & Post, Attorneys for complainants. Hunsaker & Britt, 1132-1143 Title Insurance Bldg., Fifth and Spring Streets, Los Angeles, Cal. Attorneys for deft. J. H. Merriam. Filed Aug. 27, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [45]

[Minutes of Court, March 1, 1915 — Order of Submission of Motion to Dismiss Bill of Complaint, etc.]

At a stated term, to wit, the January Term, A. D. 1915, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the Courtroom thereof, in the city of Los Angeles, on Monday, the first day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B-15—EQUITY.

LOUISA PICKENS et al.,

Complainants,

vs.

J. H. MERRIAM et al.,

Defendants.

This cause having come on at the hour of 3 o'clock, P. M., of this day pursuant to continuance, to be heard on the motion of defendant J. H. Merriam to strike out certain parts of the bill of complaint, and having also come on to be heard on the motion of said defendant Merriam to dismiss the bill of complaint; Charles A. Post, Esq., appearing as counsel for complainants; William J. Hunsaker, Esq., appearing as counsel for defendant Merriam; now, on motion of Wm. J. Hunsaker, Esq., of counsel for defendant Merriam and other defendants, and with the consent of Charles A. Post, Esq., of counsel for complainants, it is ordered that defendants Amanda Katzung, Corrine Loveland and Don Ferguson be, and they hereby are allowed ten (10) days after the ruling of the Court on defendant's motion to dismiss the bill of complaint within which to file their answer to said bill of complaint; and it is further ordered, [46] on motion of said William J. Hunsaker, Esq., of counsel for certain defendants, and with the consent of counsel for complainants, that the demurrers to the bill of complaint heretofore filed herein, and also the motions of defendant J. H. Merriam to strike out certain parts of said bill of complaint be stricken from the files herein; and thereupon said motion of defendant Merriam to dismiss the bill of complaint having been argued, in support thereof, by William J. Hunsaker, Esq., of counsel for said defendant and in opposition thereto by Charles A. Post, Esq., of counsel for complainants, and in support thereof in reply by William J. Hunsaker Esq., of counsel for said defendant and in

opposition thereto in reply by Charles A. Post, Esq., of counsel for complainants; it is ordered that this cause be, and the same hereby is submitted to the Court for its consideration and decision on said motion to dismiss the bill of complaint and the oral argument thereof, and also upon briefs to be served and filed as follows, to wit: On behalf of complainants within ten (10) days, and on behalf of defendants within ten (10) days thereafter. [47]

[Minutes of Court, March 1, 1915 — Order of Submission of Motion to Dismiss Bill of Complaint, etc.]

At a stated term, to wit, the January Term, A. D. 1915, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the Courtroom thereof, in the city of Los Angeles, on Monday, the first day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B-15—EQUITY.

LOUISA PICKENS et al.,

Complainants,

vs.

J. H. MERRIAM et al.,

Defendants.

This cause having come on at the hour of 3 o'clock, P. M. of this day, pursuant to continuance, to be

heard on the motion of defendants Eugene Wellke and Minnie S. Farnsworth to strike out certain parts of the bill of complaint, and also to be heard on the motion of said defendants to dismiss the bill of complaint; Charles A. Post, Esq., appearing as counsel for complainants; William J. Hunsaker, Esq., appearing as counsel for defendants Wellke and Farnsworth and other defendants; now, on motion of Wm. J. Hunsaker, Esq., of counsel for certain defendants, and with the consent of Charles A. Post., Esq., of counsel for complainants, it is ordered that defendants Amanda Katzung, Corrine Loveland and Don Ferguson be, and they hereby are allowed ten (10) days after the ruling of the Court on defendant's motion to [48] dismiss the bill of complaint within which to file their answer to said bill of complaint; and it is further ordered, on motion of said William J. Hunsaker, Esq. of counsel for certain defendants, and with the consent of said counsel for complainants, that the demurrers to the bill of complaint heretofore filed herein, and also the motion of defendants Eugene Wellke and Minnie S. Farnsworth to strike out certain parts of the bill of complaint be stricken from the files herein; and it is further ordered, on motion of William J. Hunsaker, Esq., of counsel for certain defendants, and with the consent of said counsel for complainants that the name of defendant Alma J. Schmidt be inserted in the motion of defendants Eugene Wellke and Minnie S. Farnsworth to dismiss the bill of complaint as one of the defendants making said motion, and that she be considered as joining

in said motion to dismiss; and thereupon said motion of defendants Eugene Wellke, Minnie S. Farnsworth and Anna J. Schmidt to dismiss the bill of complaint having been argued, in support thereof, by William J. Hunsaker, Esq., of counsel for said defendants, and in opposition thereto by Charles A. Post, Esq., of counsel for complainants and in support thereof in reply by William J. Hunsaker, Esq., of counsel for said defendants, and in opposition thereto in reply by Charles A. Post, Esq., of counsel for complainants; it is ordered that this cause be, and the same hereby is submitted to the court for its consideration and decision on said motion to dismiss the bill of complaint and the oral argument thereof, and also upon briefs to be served and filed as follows, to wit: On behalf of complainants within (10) days, and on behalf of defendants within ten (10) days thereafter. [49]

[Minutes of Court August 14, 1915—Order Granting Motion to Dismiss Bill of Complaint, etc.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Saturday, the fourteenth day of August, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B-15—EQUITY.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM et als.,

Defendants.

This cause having heretofore been submitted to the Court for its consideration and decision on defendants' motion to dismiss said bill of complaint, and the Court having duly considered the same, and being fully advised in the premises, handed down its written opinion granting said motion to dismiss, said order of dismissal being made without prejudice. [49—a]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B-15—EQUITY.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Memorandum Opinion.

In this case, although very careful attention has

been given to the matter submitted, and to the points advanced by the respective parties, because of the pressure of other matters here in court, the Court is unable to do more than indicate in the briefest manner its conclusions herein.

I am not at all sure that the challenge made as against complainants' bill, that it is barred by laches, is not sustainable. Even in the case of the fraud charged, it is clear that many of the things alleged to have been misrepresented or concealed must have been within the knowledge of complainants. They were sisters of the intestate; they must have had information as to when he married, whether his property was obtained previous thereto, and whether or not it was separate or community property. [50]

It is clear from allegations in the complaint that much of the valuable property in Topeka, Kansas, was a part of an addition in that city bearing the intestate's name; one of the complainants resided in that city and it surely must be true in spite of allegations seemingly pointing to the contrary, that she knew of the fact of property being owned there by her brother, and it is fair to assume that if such property constituting such "an addition" as is referred to had been sold as city or town lots under contract, that some or much of it had been improved by the vendees thereof, and it consequently must have come to her that such vendees or presumed occupants in possession, went into possession under some claim of title or contract of sale, and that, in consequence, *must* have known that the moneys derivable therefrom at the time of the death of the deceased, could not, un-

der the Kansas law as alleged in the bill, have descended by succession to the widow. In spite of all this information which it must be presumed complainants had, there was a delay from 1903, the date of death of the intestate until July, 1914, a period of almost eleven years, before suit was brought. During that time not only had the years run as just indicated, but conditions and circumstances had changed. The estate of complainants' brother had been entirely administered. Except what came to complainants as set forth in the bill, it had passed by distribution to the wife of the intestate, she in turn had deceased, and all of her property has been either by conveyance or distribution passed to other persons who are now made defendants in this proceeding.

[51]

Under these circumstances it is difficult for me to believe, first, that the complainants have acted with the diligence which was due from them under the circumstances, and that, their claim is not stale. (51 Fed. 487; 51 Fed. 493.)

Passing that question, however, I cannot bring myself to believe that the fraud alleged in the bill is of such an extrinsic and collateral character as that it will suffice to avoid the decrees of the Probate Courts of Kansas and California referred to in the bill. I confess to an inability to differentiate clearly in my own mind between some of the decisions both in the State and Federal Courts, as to what is and what is not extrinsic fraud, with respect to the validity of such a decree as is here sought to be overthrown. This case, however, seems to fall within

facts and reasoning of the following cases ;

U. S. v. Thropmoor, 98 U. S. 65.

Pico v. Cohn, 91 Cal. 129.

Hanley v. Hanley, 114 Cal. 690.

Langdon v. Blackburn, 109 Cal. 19.

Fealey v. Fealey, 104 Cal. 354.

Stead v. Curtis, 305 Fed. 439.

The facts alleged in Langdon v. Blackburn, *supra*, with respect to the character of the fraud perpetrated, and to things said and done which tended to prevent the plaintiff therein from pursuing such a course of inquiry as would have enabled her to have protected her rights if the fraud had not been perpetrated, in my judgment, are essentially paralleled by the facts alleged in the case at bar. Nothing is herein set forth which shows that the complainants were in any wise prevented from appearing in court and protecting their rights, or from making any investigation as to the true condition of affairs. [52]

It is true that they did assign all their interest in their brother's estate for the sum of \$1,000 each but it is difficult to believe and particularly so in view of the unverified allegations in the bill that if their brother's estate amounted to many thousands of dollars, both in Kansas and California as is alleged, that they should have been so lacking in knowledge as to the extent of it as to have conveyed all their rights therein for the meager sum of \$1,000 each. Be that as it may however, and assuming that the unverified bill states the exact facts of the case, nevertheless there is nothing therein from which it can be even inferred that complainants were at all pre-

vented from making the investigations which would **have resulted in a disclosure of all of their rights.**

After the making of the assignment by them, and its reception into and consideration by the Court, it was the duty of the Court to, and presumably it did, consider and determine all of the things which it would have had to determine had such assignment not been made, with the single exception, it was not required to determine the exact proportion of the estate, which, under the law, was distributable to the complainants. The amount, character and value of the estate belonging to the intestate, however, were determined by the Court, and were by it solemnly distributed, as according to the law, to defendant's predecessor in interest.

In this view of the case I cannot come to any conclusion other than that, the fraud charged was intrinsic as that term is used in the authorities. It was an imposition upon the Court, of course, but it was an imposition by false evidence. [53]

It is perhaps a matter of slight importance, but nevertheless I call it to the attention of counsel, that there are allegations with respect to the want of title of the defendants, that are rather inaptly made; for instance, it is said that "all of said deeds so made out by the said Jeanette Fensky were not delivered to the respective grantees named therein until after the death of said Jeanette Fensky." An allegation that "all of the deeds" were not delivered is in effect an allegation that some and perhaps all except one were delivered. Further, an allegation that such deeds were not delivered to the grantees is entirely con-

sistent with a delivery sufficient under the law to pass title to third persons in escrow.

The motion to dismiss is granted.

Though any amendment to the complaint would perhaps be futile, because of my conclusions as hereinabove set forth, the order of dismissal will be made *without prejudice*.

BLED SOE,
Judge.

August Fourteenth, 1915.

[Endorsed]: B-15—Eq. No. B-15—Eq. U. S. District Court, Southern District of California, Southern Division. Opinion and Order of Court. Filed Aug. 14, 1915. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy. [54]

No. B-15—IN EQUITY.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA J. SCHMIDT, AMANDA KATZUNG, MINNIE S. FARNSWORTH, CORRINE LOVELAND and DON FERGUSON,
Defendants.

Decree of Dismissal.

This cause came on to be heard at the January,

1915, term, on the motion of defendants to dismiss the complaint, and was argued by counsel and submitted for decision; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that plaintiff's complaint be dismissed without prejudice.

WHEREFORE it is now ORDERED, ADJUDGED AND DECREED that plaintiffs' complaint be, and the same is hereby, dismissed, without prejudice, with costs to be paid by the plaintiffs to defendants and to be taxed by the clerk.

Done in open court this 7th day of September, A. D. 1915.

BENJAMIN F. BLEDSOE,

Judge.

Decree entered and recorded Sept. 7, 1915.

WM. M. VAN DYKE,

Clerk.

By T. F. Green,

Deputy. [55]

[Endorsed]: Original. No. B-15—In Equity. In the United States District Court, Southern District of California, Southern Division, Louisa Pickens, et al., Complainants, vs. J. H. Merriam, et al., Defendants. Decree of Dismissal. Hunsaker & Britt, 1132-1143 Title Insurance Bldg., Fifth and Spring Streets, Los Angeles, Cal., Attorneys for Deft. Merriam. Filed Sep. 7, 1915. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. [56]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Assignment of Errors.

Now on this 10 day of January, 1916, came the complainants by their solicitors, Davis, Kemp & Post, and show that the order made and entered in the above cause on the 14th day of August, 1915, granting the motion of defendants to dismiss complainants' Bill of Complaint, and the decree entered in said cause on the 7th day of September, 1915, by which it was ordered, adjudged and decreed that the said Bill of Complaint be dismissed, and each of the same, are erroneous and unjust to complainants.

First. Because it does not appear on the face of said complaint by plaintiffs' own showing that they are not entitled nor that either of them are not entitled to the relief prayed for by the complaint against the said defendants, nor does it appear on the face of said complaint that said complainants are not entitled to any relief arising from the facts alleged in said complaint. [57]

Second. Because it does not appear on the face of said complaint that this Court has no jurisdiction to hear and determine this suit.

Third. Because it does not appear on the face of said complaint that this Court has no jurisdiction of the subject matter of this suit.

Fourth. Because it does not appear on the face of said complaint that said complaint is wholly without equity.

Fifth. Because it does not appear on the face of said complaint that there is a misjoinder of the parties defendant, in that the defendant J. H. Merriam is improperly united as a defendant with the other parties named as defendants in this suit.

Sixth. Because it does not appear on the face of said complaint that there is a misjoinder of causes of action set forth in said complaint in

(a) That the alleged cause of action against the said J. H. Merriam, based upon his acts as administrator of the estate of Jeanette Fensky, deceased, is united and mingled with the alleged causes of action against the persons to whom the estate of said Jeanette Fensky was distributed.

(b) That the alleged cause of action against the said J. H. Merriam, based upon his acts as administrator of the estate of Jeanette Fensky, deceased, is united and mingled with the alleged causes of action against persons that were either heirs, distributees or creditors of said estate, or with persons who were heirs or distributees of the said estate of Jeanette Fensky, and with whom no privity with the said J. H. Merriam is shown or alleged. [58]

Seventh. Because it does not appear on the face of said complaint that plaintiffs' cause of action against defendants, or any of them, is barred by the provision of Subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

Eighth. Because it does not appear on the face of said complainant that plaintiffs' cause of action against defendants, or any of them, is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

Ninth. Because it does not appear on the face of the complaint that the causes of complaint are stale, or that so long a time has passed since the matters and things complained of took place that it would be contrary to equity or good conscience, or either, for this Court to take cognizance thereof or to enforce any further or other answer thereto.

Tenth. Because it does not appear on the face of said complaint, or from the allegations therein, that the right of action set up in said complaint did not accrue to plaintiffs within five years before the bringing of this suit.

Eleventh. Because it does not appear on the face of said complaint, or from the allegations therein, that the right of action set up in said complaint did not accrue to plaintiffs within four years before the bringing of this suit.

Twelfth. Because it does not appear on the face of said complaint, or from the allegations therein, that the right of action set up in said complaint did not accrue to plaintiffs within three years before the bringing of this suit.

Thirteenth. Because it does not appear on the face of said complaint that the same is uncertain in each of the following respects, or any of them to wit:
[59]

(a) That it cannot be ascertained therefrom which, *of* any, of the papers or records in the administration proceedings in California upon the estate of Jeanette Fensky, deceased, are alleged to have failed to disclose the truth; nor in what respects, if at all, they or any of them so failed.

(b) That it cannot be ascertained therefrom what representations or statements if any, were contained in the inventory returned in the administration proceedings in California upon the estate of Jeanette Fensky, deceased; nor which, if any, of said representatives or statements were believed by plaintiffs; nor which, if any, of such representations or statements were false; nor what were the facts or circumstances showing them to be so.

(c) That it cannot be ascertained therefrom what representations if any, are alleged to have been made by defendants to plaintiffs, nor which of said representations, if any, were believed by plaintiffs; and which thereof, if any, were false, nor what facts or circumstances, if any, showed them to be so.

(c) That it cannot be ascertained from said complaint whether the plaintiffs, or either of them had, prior to the sale and transfer to Jeanette Fensky of their interest in the estate of Ferdinand Fensky, any actual knowledge of any of the alleged sales of real estate. That it cannot be ascertained therefrom whether the deeds described in paragraph XI, or any

of them, were recorded prior to the sale and transfer to Jeanette Fensky of the interests of the plaintiffs in the estate of Ferdinand Fensky, or whether the alleged purchasers, or any of them, were then in possession of the land sold. That it cannot be ascertained therefrom what, if any, part of the Kansas real estate had not been sold. That it cannot be ascertained therefrom [60] what was the value of the real estate or personal property in California set apart to the widow as a homestead or exempt property, if any. That it cannot be ascertained therefrom whether the California property of Ferdinand Fensky, or any of it, was community property; nor whether it was shown to be so in the inventory.

Fourteenth. Because it does not appear on the face of said complaint that the same is unintelligible in any respects whatsoever.

Fifteenth. Because it does not appear on the face of said complaint that the same is ambiguous in any respect whatsoever.

Sixteenth. Because M. T. Campbell is not joined as a party defendant in said action.

Seventeenth. Because the said order and decree, and each of them, are against law and equity.

WHEREFORE, complainants pray that the said order and decree be reversed and the defendants herein, and each of them be required to answer said Bill of Complaint within the time provided by law.

DAVIS, KEMP & POST,
Attorneys for Complainants.

[Endorsed]: Original. No. B-15. In the United States District Court, in and for the Southern Dis-

trict of California, Southern Division. Louisa Pickens, et al., Plaintiffs, vs. J. H. Merriam, et al., Defendants. Assignment of Errors. Filed Jan. 10, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis, Kemp & Post, Suite 812 Marsh-Strong Bldg. Tel. Home A-5037, Main 1953, Los Angeles, Cal., Attorneys for Plaintiffs. [61]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Petition for Appeal.

To the Honorable BENJAMIN F. BLEDSOE, Judge
of the District Court:

The above-named complainants, feeling themselves aggrieved by the order dismissing the said complaint entered by the said District Court on the 14th day of August, 1915, and by the decree made and entered by said Court in said cause on the 7th day of September, 1915, whereby it is ordered, adjudged and decreed that the said Bill of Complaint be dismissed, do hereby appeal from said order and

decree, and each of them, to the Circuit Court of Appeals for the Ninth Circuit, for the reasons cited in the Assignment of Errors, which is filed herewith, and said plaintiffs pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, Ninth Circuit, sitting at San Francisco, [62] California.

And your petitioners further pray that the proper order touching the security to be required of them to bring their appeal be made.

DAVIS, KEMP & POST,

Attorneys for Complainants and Petitioners.

[Order Allowing Appeal and Fixing Amount of Bond.]

It is hereby ordered that the foregoing petition be granted and the appeal allowed upon the complainants and plaintiffs in error giving bond in the sum of \$250 to the effect that if the said complainants and plaintiffs in error shall prosecute said writ of error with effect and answer all damages and costs if they fail to make their appeal good, then the said obligation to be void, otherwise to remain in full force and effect; the said bond to be approved by the clerk of this court.

Dated this 10th day of January, 1916.

BLEDSON,

Judge.

[Endorsed]: Original. No. B-15. In Equity. In the United States District Court, in and for the Southern District of California, Southern Division. Louisa Pickens, et al., Plaintiffs, vs. J. H. Merriam et al., Defendants. Petition for Appeal and Order Allowing. Filed Jan. 10 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis, Kemp & Post, Suite 812 Marsh-Strong Bldg. Tel. Home A-5037, Main 1953, Los Angeles, Cal., Attorneys for Plaintiffs. [63]

[Power of Attorney of Globe Indemnity Company.]

POWER OF ATTORNEY.

GLOBE INDEMNITY COMPANY.

Home Office: New York, N. Y.

KNOW ALL MEN BY THESE PRESENTS: That the Globe Indemnity Company, by A. Duncan Reid, its Vice-president, in pursuance of authority granted by Section 1, Article IX, of the By-laws of said Company, a copy of which section is hereto attached, does hereby nominate, constitute and appoint L. S. Ferry, T. F. Doran, J. S. Dean, W. C. Stephenson, W. W. Webb and F. E. Whitney, all of the City of Topeka, State of Kansas, its true and lawful agents and attorneys in fact, to make, execute, seal and deliver for and on its behalf, and as its act and deed any and all bonds and undertakings not exceeding One Hundred Thousand (\$100,000) Dollars each in its business of guaranteeing the fidelity of persons holding places of public or private trust and in the performance of contracts other than insurance policies, and executing

or guaranteeing bonds or other undertakings not exceeding One Hundred Thousand (\$100,000) Dollars each required or permitted in all actions or proceedings or by law required or permitted. All such bonds or undertakings to be signed for the Company by either L. S. Ferry, T. F. Doran or J. S. Dean, and attested and the seal of the Company attached thereto by either W. C. Stephenson, W. W. Webb or F. E. Whitney, as occasion may require. AND

Bonds and undertakings of Suretyship in penalties not exceeding Ten Thousand (\$10,000) Dollars each for Executors, Administrators, Receivers, Assignees, Commissioners for the Sale of Property, Guardians, Trustees, Conservators or Committees of [64] Incompetents required to be given by any Statute, Order or Decree of any Court of the State of Kansas or in the United States District Court for said State, and for Trustees and Receivers in Bankruptcy Proceedings under the Bankrupt Act of the United States. All such bonds or undertakings to be signed and the Seal of the Company attached thereto by either one of W. C. Stephenson, W. W. Webb, or F. E. Whitney.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the company at its office in New York City, State of New York, in their own proper persons.

IN WITNESS WHEREOF, the said A. Duncan Reid, Vice-president has hereunto subscribed his name and affixed the Corporate Seal of the said Globe Indemnity Company this 3d day of December, 1912.

[Seal]

A. DUNCAN REID,

Vice-president.

State of New York,
County of New York,—ss.

On this 3d day of December, A. D. 1912, before the subscriber, a notary public of the State of New York, in and for the county of New York, duly commissioned and qualified came A. Duncan Reid, Vice-president of the Globe Indemnity Company, to me personally known to be the individual and officer described in, and who executed, the preceding instrument, and he acknowledged the execution of the same, and being by me duly sworn, deposeth [65] and saith, that he is the said officer of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and the said corporate seal and his signature as such officer was duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at the city of New York, the day and year first above written.

T. A. W. IRELAND,

Notary Public, Richmond County,

Certificate filed in New York County, No. 4.

Commission expires March 30, 1914.

Extract from By-laws of the Globe Indemnity Company, adopted by the directors of said company on May 29th, 1912:

“Article IX, Section 1.—The President, any Vice-president or the General Manager and Secretary, shall have power and authority to appoint resident Vice-presidents, resident Assistant Secretaries and Attorneys in fact, and to authorize them to execute on behalf of the Company and attach the Seal of the Company thereto, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof.”

I, A. Duncan Reid, Vice-president of the Globe Indemnity Company, hereby certify that the foregoing is a true copy of Section 1, Article IX, of the By-laws of said company, and is still in force.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name as vice-president and affixed the corporate seal of the Globe Indemnity Company, this 3d day of December, A. D. 1912.

[Seal]

A. DUNCAN REID,
Vice-president. [66]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Louisa Pickens and Johanna Schutt, as
principals, and Globe Indemnity Company of New
York, as surety, acknowledge ourselves to be jointly
indebted to J. H. Merriam, Eugene Wellke, Alma J.
Schmidt, Amanda Katzung, Minnie S. Farnsworth,
Corrine Loveland and Don Ferguson, appellees in
the above cause in the sum of Two Hundred and
Fifty Dollars (\$250), conditioned that

WHEREAS, on the 14th day of August, 1915, in
the District Court of the United States, for the
Southern District of California, Southern Division,
in a suit pending in that court wherein Louisa Pick-
ens and Johanna Schutt were plaintiffs and J. H.
Merriam, Eugene Wellke, Alma J. Schmidt, Amanda
Katzung, Minnie S. Farnsworth, Corrine Loveland
and Don Ferguson were defendants, numbered on
the equity docket as B-15, an order was made

granting defendants' motion to dismiss the complaint of [67] plaintiffs, and on the 7th day of September, 1915, a decree was rendered against the said Louisa Pickens and Johanna Schutt, and the said Louisa Pickens and Johanna Schutt having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said order and decree.

NOW, THEREFORE, if the said complainants, Louisa Pickens and Johanna Schutt, shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

LOUISA PICKENS,

Principals.

GLOBE INDEMNITY COMPANY.

By T. F. DORAN,

Attorney in Fact,

Surety.

[Seal]

Attest: F. E. WHITNEY,

Attorney in Fact.

Approved this 5th day of February, 1916.

BLEDSON,

Judge.

State of Kansas,

County of Shawnee,—ss.

On this first day of February, 1916, before me personally appeared the within named T. F. Doran and F. E. Whitney, both attorneys in fact for the Globe

Indemnity Company of New York, to me known and known to me to be the individuals described in and who executed the foregoing instrument as to [68] Surety, and acknowledged to me that they executed the same.

[Seal]

R. A. FERLET,
Notary Public.

My commission expires Feb. 20, 1916.

[Endorsed]: No. B-15 — In Equity. In the United States District Court, in and for the Southern District of California, Southern Division. Louisa Pickens et al., Plaintiffs, vs. J. H. Merriam et al., Defendants. Bond on Appeal. Filed Feb. 5. 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis, Kemp & Post, Suite 812 Marsh-Strong Bldg. Tel. Home A-5037 Main 1953, Los Angeles, Cal., Attorneys for Plaintiffs. [69]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern
District of California, Southern Division.*

Clerk's Office.

No. B-15—IN EQUITY.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

Praeipce [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please issue Transcript of record on appeal in the above-entitled action containing the following documents:

Bill of complaint.

Subpoena.

Motion to dismiss of defendants Eugene Wellke,
Minnie S. Farnsworth.

Motion to dismiss of defendant J. H. Merriam.

Minute orders of March 1st, 1915.

Minute orders of August 14th. 1915, granting motion to dismiss.

Memorandum of opinion of the Court.

Decree of dismissal. [70]

DAVIS, KEMP & POST,

Attys. for Complainants and Appellants.

Received a copy of the within this 21st day of
January, 1916.

J. H. MERRIAM,

HUNSAKER & BRITT,

Attys. for Defts., for Whom We have Appeared.

[Endorsed]: Original. No. B-15—In Equity.
U. S. District Court, Southern District of California, Southern Division. Louisa Pickens et al., Complainants, vs. J. H. Merriam et al., Defendants. Praeipce for Transcript. Filed Jan. 21, 1916. Wm. M. Van Dyke, Clerk. R. S. Zimmerman, Deputy Clerk. [71]

[Certificate of Clerk U. S. District Court to
Transcript of Record.]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B-15—EQUITY.

LOUISA PICKENS and JOHANNA SCHUTT,
Complainants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Defendants.

I. Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing seventy-two (72) typewritten pages, numbered from 1 to 71, inclusive, and including page number 49A, to be a full, true and correct copy of the Bill of Complaint, Subpoena, Motion to Dismiss, of defendants Eugene Wellke and Minnie S. Farnsworth, Motion to Dismiss, of defendant J. H. Merriam, Minute Orders of March 1st, 1915, and of August 14th, 1915, Memorandum Opinion, Decree of Dismissal, Assignment of Errors, Petition for Appeal and Order allowing same, Bond on Appeal, and Praecipe for Preparation of Transcript in the above and therein-entitled cause and that the same together

constitute the record upon the appeal of Louisa Pickens and Johanna Schutt, herein, in accordance with the Praeceptum for Preparation of Transcript filed in my office on behalf of the appellants by their solicitors of record. [72]

I do further certify that the cost of the foregoing Transcript Upon Appeal is \$38 20/100, the amount whereof has been paid me by Louisa Pickens and Johanna Schutt, the appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 5th day of April, in the year of our Lord, one thousand nine hundred and sixteen, and of our Independence, the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,
Deputy Clerk.

[Ten-cent Internal Revenue Stamp. Canceled 4/5/16. L. S. C.] [73]

[Endorsd]: No. 2783. United States Circuit Court of Appeals for the Ninth Circuit. Louisa Pickens and Johanna Schutt, Appellants, vs. J. H. Merriam, Eugene Wellke, Alma J. Schmidt, Amanda Katzung, Minnie S. Farnsworth, Corrine Loveland, and Don Ferguson, Appellees. Transcript of Rec-

ord. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed April 24, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

**[Order Under Rule 16 Enlarging Time to May 1,
1916, to File Record and Docket Cause.]**

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

LOUISA PICKENS and JOHANNA SCHUTT,
Appellants,

vs.

J. H. MERRIAM, EUGENE WELLKE, ALMA
J. SCHMIDT, AMANDA KATZUNG,
MINNIE S. FARNSWORTH, CORRINE
LOVELAND and DON FERGUSON,
Appellees.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellants to docket said cause and file the record thereof, with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the first day of May, 1916.

Dated at Los Angeles, California, March 3d, 1916.

BLEDSON,
Judge.

[Endorsed]: No. 2783. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to May 1, 1916, to File Record Thereof and to Docket Case. Filed Mar. 3, 1916. F. D. Monckton, Clerk. Refiled Apr. 24, 1916. F. D. Monckton, Clerk.

No. 2783.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Louisa Pickens and Johanna Schutt,
Appellants,

vs.

J. H. Merriam, Eugene Wellke,
Alma J. Schmidt, Amanda Kat-
zung, Minnie S. Farnsworth,
Corrine Loveland and Don
Ferguson,
Appellees.

OPENING BRIEF OF APPELLANTS.

Upon Appeal from the United States District Court
for the Southern District of California, Southern
Division.

R. W. KEMP,

DAVIS, KEMP & POST and

D. R. HITE,

812 Marsh-Strong Bldg.,

Los Angeles, California,

Attorneys for Complainants and Appellants

No. 2783.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Louisa Pickens and Johanna Schutt,
Appellants,

vs.

J. H. Merriam, Eugene Wellke,
Alma J. Schmidt, Amanda Kat-
zung, Minnie S. Farnsworth,
Corrine Loveland and Don
Ferguson,
Appellees.

OPENING BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

This is an action on the part of the plaintiffs and appellants for an accounting on the part of the defendants for certain property belonging to the estates of Ferdinand Fensky and Jeanette Fensky, deceased, alleged to have been acquired by the defendants through various fraudulent acts perpetrated by them and by the said Jeanette Fensky, deceased, and others, and to be wrongfully withheld by them from the plaintiffs, who claim to be the lawful heirs of the said Ferdinand Fensky and of the said Jeanette Fensky.

The allegations contained in the complaint are in effect as follows:

That the plaintiffs Louisa Pickens and Johanna Schutt are, and have been for many years, residents and citizens, respectively, of the states of Kansas and Nebraska, and that they are sisters of Ferdinand Fensky, deceased.

That the said Ferdinand Fensky died intestate in the county of Los Angeles, state of California, on August 7th, 1903, leaving property in California, and in Topeka, Kansas, consisting of real property described in the complaint located in the counties of Los Angeles and Orange, state of California, and personal property consisting of notes and contracts for the sale of real property located in Topeka, Shawnee county, Kansas, cash in bank and in the hands of agents amounting to about \$10,000, and that the entire property belonging to Ferdinand Fensky at the time of his death was worth about \$100,000.

That at the time of the death of Ferdinand Fensky various persons in the state of Kansas were indebted to him on account of purchase money on real estate sold by him to said persons under the said contracts before mentioned, whereby he agreed to convey the real estate when the purchase price named in the contract was fully paid, and that at the time of his death there was unpaid a large amount under such contracts. That prior to his death the said Ferdinand Fensky and Jeanette Fensky executed deeds to contract purchasers but did not deliver the same.

That in October, 1903, Jeanette Fensky was appointed by the Superior Court of the county of Los

Angeles, state of California, administratrix of the estate of Ferdinand Fensky, and that one M. T. Campbell, then residing at Topeka, Kansas, the agent and representative of the said Jeanette Fensky, was, on October 22nd, 1903, appointed administrator of the estate of the said Ferdinand Fensky by the probate court at Shawnee county, Kansas.

That after the appointment of the said Jeanette Fensky as administratrix, she came into possession of said promissory notes and cash in excess of \$5000 and of said real estate, and with the intent of deceiving and defrauding the plaintiffs and other heirs of Ferdinand Fensky, she caused the California real estate to be appraised and inventoried in the total sum of \$6000, and the personal property in the sum of \$400, and purposely failed to list and inventory the cash and other personal property in her possession belonging to the said estate, and also omitted to inventory a large portion of the real property belonging to the said estate, and filed the said false inventory and appraisement.

That the said M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, filed in the county of Shawnee, state of Kansas, an inventory purporting to contain all the property coming into his hands as administrator of such estate, but purposely omitting from said inventory many of the notes and other personal property belonging thereto.

That the said Jeanette Fensky and M. T. Campbell entered into a fraudulent and collusive agreement for the purpose of defrauding these plaintiffs and procur-

ing from them their said interest in the estate of said Ferdinand Fensky without adequate consideration.

That pursuant to said scheme to defraud plaintiffs, said Campbell omitted from his said inventory any reference to any indebtedness due the said estate from purchasers of real property and listed the said real property as a portion of the estate of Ferdinand Fensky for the reason that the laws of the state of Kansas provided that real estate of an intestate husband dying without children descends directly to his widow, and no part of the same descends to the next of kin, and that the said Campbell concealed the indebtedness due the said estate from the purchasers of said property.

That thereafter the said Jeanette Fensky delivered the deeds executed by the said Ferdinand Fensky in his lifetime to the said property to the said purchasers and received the money thereon due the estate of Ferdinand Fensky, or took mortgages back payable to herself, but did not cause the said money to be paid to the administrator of the said estate of Ferdinand Fensky, said M. T. Campbell, but converted the same to her own use and benefit; nor did she ever account to the estate of said Ferdinand Fensky for the said mortgages.

That by means of the said false inventories filed in the estate of Ferdinand Fensky, deceased, in the states of California and Kansas, as aforesaid, and by false statements to these plaintiffs, the said Jeanette Fensky and the said Campbell represented that the estate of said Ferdinand Fensky consisted only of property in California of the value of about \$6000 and property

in the hands of Campbell amounting to about \$20,000, when in truth and in fact, the California real estate owned by the said intestate at the time of his death was worth about \$30,000 and the personal property in the hands of the said Jeanette Fensky was of the value of more than \$50,000, and the personal property, including that which the said Jeanette Fensky had turned over to the said Campbell, in the state of Kansas, was of the actual value of over \$60,000.

That the said Campbell further represented to these plaintiffs that it would take a long time to close up the estate of Ferdinand Fensky; that many of the notes inventoried were of little and doubtful value, and that the cost of administration would amount to a considerable sum and that the amount that each of the plaintiffs might be entitled would not exceed the sum of \$1000; that the real estate in the state of Kansas belonging to the intestate all went to the widow and all the property left by the intestate was community property, and that if they wanted their share, the said Jeanette Fensky would buy their said share for \$1000 each.

That all of which statements were false and made for the purpose of inducing these plaintiffs to accept the proposition of the said Jeanette Fensky for the purchase of their interest in the said estate; that each of said complainants was entitled to more than \$8000 from said estate.

That at the time the said representations were made neither of the plaintiffs had any knowledge of the actual facts as set out in the complaint, but relied upon the inventories filed in the said estate, and the

representations so made to them, and believing the same to be true, accepted the sum of \$1000 each from the said Jeanette Fensky and executed to her releases and quitclaim deeds conveying to her all their right, title and interest in the said estate of their said deceased brother, Ferdinand Fensky.

That the said sum of \$1000 so paid to each of them was paid out of funds in the hands of the said Jeanette Fensky and the said Campbell belonging to the said estate of Ferdinand Fensky.

That the said Jeanette Fensky died in Los Angeles, California, July 8th, 1908. At the time of her death she was the owner of certain real estate described in the complaint and that all of the same had been purchased by her with money derived from the estate of Ferdinand Fensky.

That prior to her death the said Jeanette Fensky executed deeds to the said real estate to certain and various defendants in this action, but that the said deeds were not delivered to the various grantees until after her said death.

That after the death of Jeanette Fensky the defendant J. H. Merriam, of Los Angeles, state of California, was appointed as administrator of her estate. That said J. H. Merriam filed an inventory in which it appears that the total assets of the said estate of Jeanette Fensky amounted to about \$3500, consisting entirely of personal property. That none of the said real estate belonging to the said Jeanette Fensky and described in the complaint was inventoried in the said estate, nor was the same distributed by the said Superior Court of said Los Angeles county.

That the said J. H. Merriam was fully advised of the property belonging to the said Jeanette Fensky at the time of her death and had full knowledge of the rights of the complainants herein.

That after the estate had been closed the said J. H. Merriam was requested to continue the administration of the said estate, but failed, refused and neglected so to do.

That all the estate of Ferdinand Fensky was at the time of his death his separate property, and as such, on the death of his widow, the estate in her hands descended ratably to the surviving brothers and sisters of the said Ferdinand Fensky.

That plaintiffs have received nothing from the estate of their said deceased brother Ferdinand Fensky, excepting said sum of \$1000 each.

That neither complainants ever had any notice of the fraud so perpetrated upon them until July, 1912; that thereupon they commenced an investigation which developed the facts alleged in the said complaint.

The above are the important material allegations contained in the bill of complaint, all of which, together with sufficient details, are fully set out in the complaint.

The complaint prays that an account be taken of all the property of the said Ferdinand Fensky, deceased;

That the pretended deeds of release and of claim executed by these plaintiffs to the said Jeanette Fensky be declared fraudulent and void and of no effect, and that an account be taken of the estate of said Jeanette

Fensky, and the sources from which the same was derived.

That the deeds of Jeanette Fensky to the other defendants be decreed null and void and that the defendant J. H. Merriam be required to account to the plaintiffs for their distributive share of the said estate of Jeanette Fensky, and for such other, further and general relief as to the court may seem equitable and just.

All the defendants except Schmidt, Katzung, Loveland and Ferguson, appeared and moved to dismiss the complaint on the grounds that it appeared on the face of the complaint by plaintiffs' own showing:

1. That plaintiffs were not entitled to the relief prayed for in the complaint.
2. That the court had no jurisdiction to hear the suit, nor of the subject matter of the suit.
3. That the complaint is wholly without equity.
4. That there is a non-joinder of parties defendant, in that M. T. Campbell was not joined as a party defendant therein.
5. That there is a misjoinder of causes of action.
6. That the alleged cause of action of plaintiffs is barred by subdivision 4 of section 338, and section 343, of the Code of Civil Procedure of the state of California.
7. That the causes of complaint are stale, and that so long a time has passed since the matters complained of occurred that it would be contrary to equity and

good conscience for the court to take cognizance thereof.

8. That the right of action set up in the complaint did not accrue within five years before the bringing of the suit; nor within four years before the bringing of the suit, nor within three years before the bringing of the suit.

9. That the complaint is uncertain, unintelligible and ambiguous for the reason that it cannot be ascertained therefrom which papers or records in the administration proceedings in California upon the estate of Jeanette Fensky, deceased, failed to disclose the truth, nor in what respects they so failed; or which statements contained in the inventory returned in the administration proceedings in California upon the estate of Jeanette Fensky were believed by plaintiffs, or which statements were false, or what were the facts or circumstances showing them to be so; that it cannot be ascertained therefrom what representations, if any, were alleged to have been made by defendants to the plaintiffs; nor which representations were believed by plaintiffs; nor which representations were false, or what facts or circumstances showed them to be so. [See pages 35 to 39 and 40 to 43, inclusive, of transcript.]

The defendants Amanda Katzung, Corrine Loveland and Don Ferguson, on motion of their attorney, Wm. J. Hunsaker, asked, and on the consent of attorney for plaintiffs, were allowed by the court ten days after the ruling of the court on the motion of the other defendants to dismiss the bill of complaint

within which to file their answer to said bill of complaint.

After argument by counsel for the various parties, the court, on the 14th day of August, 1915, made an order granting the motion of defendants to dismiss the said action [see Tr. pp. 48 and 49]; and on the 7th day of September, 1915, pursuant to said order, made and entered a decree of dismissal [see Tr. pp. 54 and 55], from both of which order and decree of dismissal plaintiffs have appealed.

At the time of the making of the order granting the motion to dismiss, the learned trial court filed an opinion in the case, in which his reasons for granting the motion are set out, and to which this Honorable Court is referred. [See Tr. pp. 49 to 54, inc.]

While the opinion states but few reasons for granting defendants' motion, we shall assume here that the court held with defendants on all grounds set out.

SPECIFICATIONS OF ERROR.

We hold that the honorable trial court erred in making the order of August 14th, 1915, dismissing plaintiffs' bill of complaint, and in making and entering the decree on September 7th by which such dismissal was formally ordered, adjudged and decreed, and have specified the making of this order and decree an error on the part of said court for the following reasons:

1st. The complaint is sufficient and states a cause of action for fraud, and under the allegations contained therein the plaintiffs are clearly entitled to the relief prayed for.

2nd. The court had jurisdiction over the persons named as and made parties to the action in the bill of complaint, and also over the subject matter of the complaint.

3rd. The matters complained of in the complaint were not stale and the court could take cognizance of such matters without violation of the principles of equity, and the plaintiffs were not guilty of *laches*, nor was the cause of action barred by the statutes of limitation of the state of California mentioned in defendants' motion to dismiss.

4th. The fraud complained of by plaintiffs was extrinsic in character and not intrinsic.

5th. There was no misjoinder of parties or of causes of action.

6th. The complaint was not ambiguous, uncertain or unintelligible.

Under the assumption that the trial court held with defendants on each and every ground named in their motion to dismiss, we assigned as error in our formal assignment of errors, the ruling of the court on each individual ground. [See Tr. pp. 60 and 61.] In our brief, however, we shall condense and eliminate wherever possible, and shall specify as errors, on which we rely, only such as we deem material.

In addition to the making of the order and rendering the formal decree of dismissal, heretofore specified as error, we hereby specify the following rulings and

holdings of the trial court as error on which we rely for the reversal of this decree:

1. That the complaint is insufficient and does not state a cause of action for fraud, and that plaintiffs are not entitled to the relief prayed for.

2. That the court has no jurisdiction of the parties to or subject matter of the suit, nor jurisdiction to hear and determine the suit.

3. That the matters complained of are stale, and that plaintiffs are guilty of *laches*.

4. That the cause of action set up in the bill of complaint is barred by the statute of limitation of the state of California, to-wit: Subdivision 4 of section 338 of the Code of Civil Procedure, and section 343 of the Code of Civil Procedure.

5. That the fraud complained of by plaintiffs is intrinsic in character and not extrinsic.

6. That there is a misjoinder of the parties and of the causes of action.

7. That the complaint is ambiguous, uncertain and unintelligible.

And we shall confine our argument to these specified errors.

Complaint States Cause of Action and Complainants Are Entitled to Relief.

It is universally the rule, supported by the great weight of authority, that in order to state a cause of action for fraud a complaint must allege in effect,

as follows: That material representations, with intent to deceive and defraud, were made by the parties against whom the fraud is charged; that these representations were false; that the complainants believed and relied upon the same; that by reason of complainant's belief and reliance thereon he was induced to act or alter his condition and was thereby damaged. Or, in the language of the court, in the case of *Watson v. Poulson*, 15 Jurist, 1111, which language is adopted by the United States Supreme Court in the case of *Ming v. Woolfolk*, 116 U. S., page 602:

“The telling of an untruth, knowing it to be an untruth, with intent to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage.”

It is also generally held that concealment of essential facts which the defrauded party is entitled to know, is equivalent to fraudulent representation.

See *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, in which case, at page 388, the court says:

“In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare*; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the

action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

Every essential allegation necessary to state a cause of action for fraud is contained in the bill of complaint in the action at bar, and not a single element of fraud is lacking. The complaint clearly and positively alleges that the said Jeanette Fensky and the said M. T. Campbell each returned false inventories in the estate of Ferdinand Fensky. That they purposely concealed a great part of the assets belonging to the estate; that they represented to the complainants that the estate of Ferdinand Fensky consisted only of property situate in California of the value of about \$6000, and of property in the hands of Campbell amounting to about \$20,000, and that of this property the widow, Jeanette Fensky, was entitled to one-half, and that the remaining half only was subject to distribution among the other heirs at law of the intestate, and that of this property the widow would receive about \$10,000 from property in the hands of Campbell and about \$3000 of property in her hands in California, and that in addition thereto she was entitled to the real estate described in the inventory filed by Campbell in the Probate Court of the state of Kansas, and that the share of said estate which each of said complainants ultimately might be entitled would not exceed the sum of \$1000.

That all these representations were false, and known to be false by Jeanette Fensky and Campbell, and made with the intent of deceiving the complainants and of inducing them to release and transfer their interests in the said estate of Ferdinand Fensky to Jeanette Fensky for a much smaller sum than their interests were really worth. That in truth and in fact the California real estate owned by the said intestate at the time of his death was worth nearly \$30,000 and the personal property in California in the hands of said Jeanette Fensky was of the value of more than \$50,000; the entire estate was of the value of \$100,000, all of which was well known to the said Jeanette Fensky and the said Campbell, and that each of the complainants were really entitled to receive from said estate, upon a full disclosure and accounting, more than \$8000.00. (See paragraphs 10, 11, 12 and 13 of the complaint, pages 10 to 21, inclusive, of Tr.)

The complaint further alleges that at the time the representations were made, the complainants had no knowledge of the actual facts as herein stated, but relied upon the inventories filed and the representations made to them, and believing the same to be true, accepted the offer of the said Jeanette Fensky to release and transfer to her all their interest in the said estate of Ferdinand Fensky for the sum of \$1000 each. That the said sum of \$1000 was paid from the funds belonging to the estate of Ferdinand Fensky and that if the complainants had known or had any suspicion of the real facts, that neither of them would have executed said releases, but would have demanded their full share of the said estate of Ferdinand Fensky.

(See par. 12 of complaint, pages 16 to 18, inclusive, of Tr.)

From the above allegations it is clearly shown that each of the complainants were damaged by this fraud and deception practiced upon them in the sum of many thousands of dollars.

We cannot see how it can be seriously urged that a full and complete cause of action for fraud has not been stated in the bill of complaint.

The complaint further alleges that after the distribution of the estate of Ferdinand Fensky, which it is alleged consisted entirely of his separate property, Jeanette Fensky, with the money and mortgages received from said estate, purchased real estate in Los Angeles county, California, which is described in the complaint, and that all the property acquired by her prior to her death, was purchased through the money and assets belonging to the estate of her said husband, Ferdinand Fensky. (See par. 13 of complaint, pages 18 to 21, inclusive, of Tr.)

That the said Jeanette Fensky died on July 8th, 1908, and that prior to her death she executed deeds to the property then owned by her to various defendants, but which deeds were not delivered to the grantees therein until after her death.

That the defendant J. H. Merriam was, by the Superior Court of Los Angeles county, appointed administrator of the estate of Jeanette Fensky on petition of defendants Wellke, Katzung and Schmidt; that an inventory in said estate was filed by the said Merriam on September 8th, 1909, alleging that the total assets of said estate was the sum of \$3500.00, consist-

ing of \$2324.28 as money, and a claim against the defendant Katzung, and a note against defendant Don Ferguson for \$1050, and alleged that the sole heirs at law of the said Jeanette Fensky were defendants Eugene Wellke, Alma J. Schmidt and Amanda Katzung.

It is further alleged in the complaint that the said pretended final account was filed by the said defendant Merriam; that he knew of the real estate owned by the said Jeanette Fensky at the time of her death, and he knew that the same was distributable among the heirs at law of Ferdinand Fensky, which included these complainants, and that the defendants Wellke, Katzung and Schmidt had no interest whatsoever, and knew of the execution and non-delivery of the deeds to the various defendants, as alleged in the complaint. That since the filing of said final account and the distribution of the assets of the estate as contained in the inventory, the said Merriam had been requested by complainants to further administer on said estate, but has failed, refused and neglected so to do. (See par. 14 of complaint, pages 21 to 25, inclusive, of Tr.)

It would seem without question that Jeanette Fensky, having obtained the respective shares of the complainants in the estate of Ferdinand Fensky through deception and fraud, that she held the same during her lifetime in trust for complainants, and that at any time after the discovery of the same by complainants she would be accountable to them for the property so obtained.

That one who acquires land or other property by fraud or mistake, or under any circumstances as would

render it inequitable for him to retain it, is in equity regarded as a trustee of the party who suffers by reason of the fraud or other wrong, and who is in equity entitled to the property, is so well settled as to scarcely warrant discussion here. However, we will briefly touch upon this matter and cite a few of the leading cases on the subject.

This principle is recognized by the law of the state of California in the form of a code section, to-wit: Section 2224 of the Civil Code, which reads as follows:

“One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.”

In all cases of this character a constructive trust will be impressed upon the property so acquired in favor of the person equitably entitled thereto. This will obtain although he may never have had any legal estate in the property.

A leading case on this question is that of *Bacon v. Bacon*, reported in 150th Cal., at page 477. This action arose through a mistake in the reading and probating a will, in which the word “ten” was, through mistake, read as “two”, and by reason of the mistake certain legatees named in the will received \$2000 each instead of \$10,000, the amount intended to be inserted by the testator, and the suit was brought to obtain a judgment for the unpaid balance of \$8000, with

interest; the action being brought some three years after the distribution of the estate. Judgment was rendered for the plaintiffs, from which the defendants appealed. The Supreme Court sustained the decision of the trial court, and in a well considered opinion held that the Superior Court had jurisdiction of the action and power to review the decree of distribution and to declare that the defendants held as involuntary trustees of the plaintiff the property obtained by them through the decree of distribution. In rendering its opinion, the court followed its decision in the case of *Sohler v. Sohler*, 135 Cal. 323. Other cases so holding are:

Wingerter v. Wingerter, 71 Cal. 105;
Sanford v. Sanford, 139 U. S. 645, and
Estate of Walker, 160 Cal. 549.

The facts in this latter case were as follows: William Walker, a resident of the county of Santa Cruz, died supposedly intestate, and letters of administration were issued, administration upon the estate was duly made and the decree of final distribution was made and entered, and the property delivered to the distributees and the administrator discharged. More than eight months thereafter one Frank D. Enor filed an alleged will of the deceased and petition for its probate. The distributees contested, and in their contest set up the facts above related. A demurrer to the contest was sustained and the will ordered admitted to probate. The distributees appealed from this order.

The Supreme Court sustained the order of the trial court, and a portion of its opinion reads as follows:

“Respondent’s position is that neither the order admitting the will to probate, nor the effect of that order, is in any wise an attack, direct or collateral, upon the decree of distribution; that if through accident, fraud, or mistake, the distributees are holding property under the decree, to which they are not entitled, equity will do justice, not by overthrowing the decree of distribution, but by declaring the distributees to be involuntary trustees of the rightful owners of the property. This principle is, of course, well established. (Civ. Code, sec. 2224; *State v. McGlynn*, 20 Cal. 233 (81 Am. Dec. 118); *Wingerter v. Wingerter*, 71 Cal. 105 (11 Pac. 853); *Mulcahey v. Dow*, 131 Cal. 73 (63 Pac. 158); *Sohler v. Sohler*, 135 Cal. 323 (87 Am. St. Rep. 98, 67 Pac. 282); *Parsons v. Weis*, 144 Cal. 419 (77 Pac. 1007); *Bacon v. Bacon*, 150 Cal. 481 (89 Pac. 317); *Insurance Co. v. Hodgson*, 7 Cranch, 332 (3 L. Ed. 362); *Case of Broderick’s Will*, 21 Wall, 503 (22 L. Ed. 599)).”

See also:

Estate of Hudson, 63 Cal. 457.

The principle we contend for here is well stated in *Pomeroy’s Eq. Jurisprudence*, at page 155, in which the author says:

“If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the

one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.”

In Pomeroy’s Eq. Jur., 919, it is said:

“Where a probate is obtained by fraud, equity may declare the executor or the other person deriving title under it a trustee for the party defrauded.”

In the Estate of Walker (Cal.), 117 Pac. 511, Chief Justice Beatty in his concurring opinion said:

“But if it turns out that there was a will which was suppressed by an heir for the purpose of defrauding devisees or legatees, or, as in this case, lost and undiscovered until after distribution, the remedy of the devisee or legatee against the heir who has received what was his is in equity to charge the heir as his trustee, and to require him to account and to transfer what he has acquired through the fraud, accident, or mistake.”

In this connection we would call the attention of the court to the fact that the bill of complaint specifically alleges that at least two pieces of the real estate belonging to Ferdinand Fensky at the time of his death remained in the hands of the widow, Jeanette Fensky, at the time of her death, although she attempted to convey it to the defendant Amanda Katzung by deed which was never delivered. (See subd. C, par. IV of complaint, pages 5 and 6 or Tr.; items 7 and 8, par. XIII of complaint, page 20 of Tr., and par. XIV of complaint, page 24 of Tr.) And also that the balance of the said real estate was acquired by

her by the use of the money obtained from the estate of her said deceased husband. Under these circumstances it must be held that all the property in the hands of Jeanette Fensky at the time of her death was an express trust in her hands for the benefit of these complainants, and the character of this trust could not be changed by investing the funds in other property and taking title thereto in the name of another.

See:

McClune v. Collyear, 80 Cal. 378.

See also Pomeroy's Eq. Jur. Sec. 918, *et seq.*, 2nd ed., in which he says:

“The remedy which equity gives to the defrauded person is most extensive. It reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice. A court of equity will wrest property fraudulently acquired not only from the perpetrators of the fraud, but, to use Lord Cottenham's language, ‘from his children and his children's children,’ or, as elsewhere said, from any person amongst whom he may have parceled out the fruits of his fraud. There is one limitation: If the property which was acquired by the fraud has come by transfer into the hands of a bona fide purchaser for valuable consideration and without notice, even though his immediate grantor or assignor was the fraudulent party himself, the hands of the court are stayed and the remedy of the defrauded party, with respect to the property itself is gone; his only

relief must be personal against those who committed the fraud.”

In this case at bar the only claim made by the defendants to the property obtained from the estate of Jeanette Fensky is that they are next of kin of the said Jeanette Fensky and by virtue of the undelivered deeds. There is no superior equity in favor of these defendants as against the plaintiffs, hence no such limitation as that mentioned above exists in this case.

As to the defendant J. H. Merriam, the administrator of the estate of Jeanette Fensky, under the California statutes, all of her estate passed into his possession and control, and it was his duty as such administrator to take charge of any estate, either real or personal, belonging to her at the time of her death. It is charged in the bill of complaint that he knew of the condition and circumstances of the deeding of the property to the defendants, and yet he neither took or claimed possession of it.

We submit that under the facts alleged in this complaint that there can be no question but that plaintiffs are entitled to the relief prayed for.

It is alleged that all the property belonging to the estate of Ferdinand Fensky was his separate property, and if so, which here must be assumed to be the facts, then under the laws of the state of California, in effect now and at the time of the death of Jeanette Fensky, governing the distribution of estates of decedents, these complainants, and not the defendants Katzung, Wellke and Schmidt, were the heirs of Fer-

dinand Fensky and entitled to the proceeds of the estate of Jeanette Fensky.

See section 1386, Civil Code of California. Subdivision 8 of this section reads as follows:

“If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal share to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal share, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation.

“If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and

sisters of such spouse and to the descendants of any deceased brother or sister by right of representation.”

It is clear that under the second paragraph of this subdivision above quoted, that Ferdinand Fensky having died without issue (see par. 3 of complaint, page 5 of Tr.), and all his property at the time of his death being his separate property, that the same on the death of Jeanette Fensky would go to his heirs and not to the heirs of Jeanette Fensky. This would be true, even though the property, or any part thereof, obtained by Jeanette Fensky from the estate of Ferdinand Fensky had not been procured through the fraud perpetrated upon the complainants.

Furthermore, the property claimed to be owned by defendants Katzung, Schmidt and Wellke, and vested in them through deeds executed by Jeanette Fensky in her lifetime but not delivered until after her death, belongs to the estate of Jeanette Fensky, for it is unquestionably the law universally laid down by all courts, that a deed executed in the lifetime of the decedent but not delivered until after the death of the grantor occurs, vests no estate in the property therein described, in the grantee named therein.

And the property described in these undelivered deeds having been obtained by Jeanette Fensky from the proceeds of the estate of her deceased husband, the same being his separate property, would, under the section of the California Code above quoted, go to the heirs of Ferdinand Fensky, including these complainants.

We do not see how it can be questioned that under the facts alleged in the bill of complaint that the bill states a complete cause of action for an accounting against the defendants, and that the complainants are entitled to the relief prayed for.

The Court had Jurisdiction Over the Parties to and the Subject Matter of the Action and Had Jurisdiction to Determine the Same.

Although the question of jurisdiction is raised in defendants' motion to dismiss, we cannot believe that the contention is seriously made by the learned counsel for defendants, for the bill specifically alleges that the complainants are citizens and residents of the states of Kansas and Nebraska, and that the defendants are citizens and residents of the state of California (see par. 1 of complaint, page 4 of Tr.), that the amount in controversy exceeds in value the sum of \$3000 (see par. 2 of complaint, pages 4 and 5 of Tr.); that the real estate in which the complainants assert an interest is situate in the counties of Los Angeles and Orange, state of California, both of which counties are within the jurisdiction of the trial court (see par. 4 of complaint, pages 5 and 6 of Tr., and par. 13 of complaint, pages 18 to 21, inclusive, of Tr., par. 14 of complaint, pages 21 to 25, inclusive, of Tr.).

Unquestionably under section 2 of article III of the Constitution of the United States and the Act of March 3rd, 1875 (see vol. 4 Fed. Stat. Annotated, sec. 265), these facts would give the court jurisdiction over the subject matter of, and parties to, the action, and

also jurisdiction to hear and determine the suit. Owing to the fact that the court is undoubtedly so familiar with both the above mentioned sections of the Constitution and the statute referred to, we deem it unnecessary to do more than to refer to the same.

See also:

Ober v. Gallagher, 93 U. S. 199.

It appears to be the law settled by numerous decisions that federal courts of equity have original jurisdiction over executors and administrators appointed by state probate courts, such executors and administrators being considered as trustees in favor of heirs, creditors, etc., of the estate.

The case of *Green's Administratrix v. Creighton*, 23 Howard, 90, which was an action to establish a judgment against an administrator and the breach of his administrator's bond, and to seek discovery of the assets and an accounting, the court, in answer to the contention, that the pendency of proceedings in the probate court might oust the jurisdiction of the Circuit Court of the United States, and referring to the case of *Suydam v. Broadnax*, 14 Pet, 67, said:

"This court declared that the eleventh section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one state to sue a citizen of another state in the Circuit Court of the United States. 'It was certainly intended,' says the court, 'to give to suitors having a right to sue in the Circuit Court remedies co-extensive with those rights. These remedies would not be so, if any proceedings under an act of a state legis-

lature to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the Circuit Court.’ ”

A leading case on this subject is that of *Payne v. Hook*, 7 Wallace 425. The facts in this case are not at all unlike the case at bar. In this case a citizen of Virginia filed a bill in equity in the United States courts of Missouri against the administrator and sureties on his bond to obtain for the complainant her distributive share in the estate of her brother. The plaintiff charged gross misconduct on the part of the administrator in making false statements, using money of the estate for his private gain, and, that he “obtained through the use of false representations a receipt in full for her share of the estate, on the payment of a less sum than she was entitled to receive.” The object of the bill was to obtain relief against these fraudulent proceedings, and to compel a true account of administration, “in order that the real condition of the estate can be ascertained, and the complainant receive what justly belongs to her.”

On demurrer to the bill it was contended that exclusive jurisdiction over disputes concerning the administration of the estates of deceased persons was given by the local law to the probate courts; that there was a defect of parties plaintiff because the other distributees were not made parties; that there was a misjoinder of parties because the sureties of the administrator were joined; and, that the bill was multifarious. The trial court sustained the demurrer and the complainant electing to abide by her bill, it was

dismissed and the case appealed to the Supreme Court. In that court the administrator insisted that exclusive jurisdiction was in the Missouri probate court, and therefore the Federal Circuit Court had no jurisdiction to entertain the controversy.

On appeal the Supreme Court reversed the decree of the Circuit Court and in its opinion, the court, in discussing the jurisdiction of the federal courts in such cases, said:

“We have repeatedly held ‘that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.’ If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equity. The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitations or restraint by state legislation, and is uniform throughout the different states of the union.

“The Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a complete and adequate remedy at law, is the only test of equity jurisdiction, and the application of this principle to a particular case

must depend on the character of the case, as disclosed in the pleadings.

“‘It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.’”

The opinion and decision in this case is frequently followed, notably in the case of *Waterman v. Canal Bank*, 215 J. S. 33, in which case, at pages 45, 46 and 47, the court said:

“The complainant, a citizen of a different state, brings her bill against the executor and certain legatees named, who are likewise citizens of another state, and are all citizens of Louisiana, where the bill was filed, except one, who was beyond the jurisdiction of the court, and for the reasons stated in her bill she asks to have her interest in the legacy alleged to be lapsed and the residuary portion of the estate established.

“The controversy is within the equity jurisdiction of the courts of the United States as heretofore recognized in this court, and such jurisdiction cannot be limited, or in any wise curtailed by state legislation as to its own courts. The complainant, it is to be noted, does not seek to set aside the probate of the will which the bill alleges was duly established and admitted to probate in the proper court of the state.

“The United States Circuit Court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to deter-

mine as between the parties before the court the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. The decree to be granted cannot interfere with the possession of the estate in the hands of the executor, while being administered in the probate court, but it will be binding upon the executor, and may be enforced against it personally. If the federal court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it cannot interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the court of probate, the decree can find the amount of the residue, as determined by the administration in the probate court in the hands of the executor, to belong to the complainant, and to be held in trust for her, thus binding the executor personally, as was the case in *Payne v. Hook*, 7 Wall. 425, *supra*, and *Ingersoll v. Coran*, 211 U. S. 335, *supra*.

“It is to be presumed that the probate court will respect any adjudication which might be made in settling the rights of parties in this suit in the federal court. It has been frequently held in this court that a judgment of a federal court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim of federal right which may be protected in this court.”

This case has been followed by the United States Supreme Court in the case of *McClellan v. Carland*, 217 U. S. 268. In fact, we think that it has been so definitely decided by numerous decisions that the

federal courts have jurisdiction over the parties, subject matter and the question in controversy in cases of the character of the one at bar, that the right of the court to exercise such jurisdiction and in fact that it is its duty to do so, can no longer be questioned.

Complainants Not Guilty of Laches.

One of the grounds contained in defendants' motion for the dismissal of the action is that the causes of complaint are stale, and that so long a time has passed since the matter complained of took place that it would be contrary to equity and good conscience for the court to take cognizance thereof, or in other words, that the complainants are guilty of laches. (See No. 9, page 37, and No. 9, page 42, of Tr.) In the opinion rendered by the honorable trial court this contention of defendants appears to be sustained, the court indicating in the opinion rendered that he considered that many of the matters alleged to have been misrepresented or concealed must have been within the knowledge of the complainants for the reason that they were sisters of the intestate, Ferdinand Fensky, and that one of them resided in the city of Topeka, Kansas, where a portion of his property was located.

We contend that there is nothing contained in the complaint which would justify such an assumption. The mere fact that the complainants were the sisters of the intestate would not justify the presumption that they had any especial knowledge of the affairs of their brother, Ferdinand Fensky, or of the amount of property that he owned, or when he acquired the

same. This might or might not be the case. Neither would the presumption be justified from any allegations in the complaint that complainants knew anything of the nature of the sales of the said property, or as to whether or not any of the same had been sold, or who was in possession of the same, or whether the inventories contained all the property of the deceased.

In the case of *Pickens, et al., v. Campbell, et al.*, an action brought in the District Court of Shawnee county, Kansas, by these same complainants, against the administrator of M. T. Campbell, the person named in the complaint in this action, and his bondsmen to have the settlement of the estate of Ferdinand Fensky set aside for fraud, which action is based upon the identical facts and circumstances as the case at bar. The court passed upon the question of the exercise of diligence by the plaintiffs in learning of the matters alleged to have been concealed, and held that in the absence of anything to excite suspicion on the subject, that it would not be said as a matter of law that the plaintiffs were under an obligation to make such an investigation.

In the district court a demurrer to this action by the defendants was overruled and the defendants appealed. The action of the trial court in overruling the demurrer was sustained by the Supreme Court of the state of Kansas in a recent decision, which we believe has not yet been published in the reports of that state, and as the decision covers many of the points raised in the action at bar, we have, for the

convenience of the court, attached as a supplement to our brief, a copy of this decision. This decision will be found in the advance sheets No. 1, Pac. Reporter of Sept. 4, 1916, vol. 159, p. 21.

Moreover, as alleged in the complaint, a large portion of the property owned by Ferdinand Fensky at the time of his death was located in Los Angeles county, California, several thousands of miles from the residence of these complainants, and particularly there is no reason to presume that they would have any knowledge of the amount, value or condition of this property (see paragraphs 3 and 4 of complaint, pages 5 and 6 of Tr.); and finally, there is a positive allegation contained in the complaint that the complainants had no notice, knowledge or suspicion of the truth respecting the estate of their deceased brother, or of the fraud perpetrated upon them until late in the summer of 1912.

We respectfully submit that under the allegations contained in the complaint, the presumptions indulged in by the trial court are not justified.

It is the general rule that, strictly speaking, laches implies more than mere delay or lapse of time; it requires some actual or presumable change of circumstances or conditions making it inequitable to grant the relief asked. No arbitrary rule exists for determining when a demand becomes stale or when delay will be excused, and the question of laches is generally decided upon the particular circumstances of each case (16 Cyc. 152, par. 3), or as stated in the case of *O'Brien v. Wheelock*, 184 U. S., at page 493:

“The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of circumstances during neglectful repose, rendering it inequitable to afford relief.”

See also *Gallihier v. Cadwell*, 145 U. S. 368, in which the court holds in addition that the cases in which laches are charges and sustained proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper form.

In the case at bar, as disclosed by the allegations of the complaint, there is nothing to indicate that the enforcement of the claim of plaintiffs would work any inequity as to the defendants; nor is there anything to indicate that during the time that elapsed after Jeanette Fensky obtained the property from the estate of her husband, Ferdinand Fensky, through the releases executed by these complainants, until the bringing of this action, to-wit, from August 3rd, 1904, until July 8th, 1914, there was any such change in the condition of the property or the circumstances of the relationship of the parties, or such change of any character that would make it inequitable to grant the relief prayed for. In fact, we can think of no change that could have taken place that would in any way work any inequity insofar as these defendants are concerned, for none of them were bona fide purchasers for value, but merely acquired the property through

the fact that they were the next of kin of the said Jeanette Fensky, or through the deeds attempting to convey the same to them without any consideration whatsoever. It is universally the rule that where the delay does not appear to have been injurious or prejudicial to the defendants, such delay in itself will not be a bar to relief.

See:

Bacon v. Bacon, *supra*, page 493;

Cahill v. Superior Court, 145 Cal. 47;

Soule v. Bacon, 150 Cal. 497.

Manifestly, the complainants could not be charged with laches until they had some notice or knowledge of the facts constituting the fraud that was perpetrated upon them, and as we have previously pointed out, the complaint specifically alleges that they had no knowledge or suspicion of the truth until late in the summer of 1912, and the complaint also alleges that thereafter they used extraordinary efforts to learn the facts. The complaint alleges further that they had no notice or knowledge that the said deeds to the defendants, executed by the said Jeanette Fensky, were not delivered to the defendants during the lifetime of the said Jeanette Fensky, and that they believed the statements contained in the inventories filed in the estate of the said Jeanette Fensky and of the said Ferdinand Fensky.

Nor is there anything contained in the complaint from which it could be concluded that it was the duty of these complainants as a matter of law to make any investigation as to the estate of Ferdinand Fensky or

of Jeanette Fensky prior to the time that they made the discovery in 1912 which aroused their suspicion. In fact, the complainants had a right to rely upon the inventories filed and the statements made to them by the said Campbell and the said Jeanette Fensky, for a confidential relation is presumed to exist between an administrator and the heirs of the estate, and executors, occupying as they do trust relations toward such beneficiaries and are bound to the utmost good faith in their transaction with such beneficiary.

See:

Bacon v. Bacon, *supra*, at page 489.

Also:

Robins v. Hope, 57 Cal. 497.

In connection with the subject of laches we would call the attention of the court to the rule universally laid down, that length of time is no bar to a trust clearly established or in a case where fraud is imputed and proved, for, as stated in the case of Prevost v. Gratz, 6 Wheat, 481, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense and calls more loudly upon a court of equity to grant ample and decisive relief. In the case of McIntyre v. Pryor, 173 U. S. 37, this phase of the subject of laches is treated in a well considered opinion written by Justice Brown, and many important cases are cited therein, and without quoting from the case we would most respectfully urge the attention of the court to this opinion.

See also:

Meader v. Norton, 11 Wall. 442, at page 458.

Under all the circumstances, we most respectfully submit that the defendants ought not to be heard to say that complainants' bill should be dismissed on the ground of laches.

Statute of Limitations. Not a Bar.

The defendants have set up as ground for their motion to dismiss the Statutes of Limitations of the state of California, especially citing subd. 4, section 338 and section 343 of the Code of Civil Procedure.

Subd. 4, section 338, reads as follows:

Within three years:

"An action for relief on the ground of fraud or mistake. The cause of the action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Section 343 reads as follows:

"An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

It is only necessary to read the said subd. 4 of section 338 in connection with paragraph XVI of plaintiff's complaint to see that there is no merit in the contention of defendants that the cause of action is barred by this statute; for the statute itself states that the cause of action in a case of fraud is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, and the

said paragraph XVI of the complaint positively and definitely states that the complainants had no suspicion of the truth of the matters alleged in the complaint until late in the summer of 1912, and as this action was filed on July 8th, 1914, only two years elapsed from the time the complainants first became suspicious as to the transactions of Jeanette Fensky and of the other defendants until the suit was filed, and in the meantime, as alleged in the said paragraph XVI, the plaintiffs were using their utmost efforts to ascertain all the facts, and they furthermore allege that it was not until early in 1913 that they had any notice or knowledge that the deeds from Jeanette Fensky to the defendants were not delivered during the lifetime of said Jeanette Fensky. Unquestionably, under the allegations of the complaint, the cause of action is not barred by this section of the code.

There are many decisions of our Supreme Court of California supporting our contention as to the application of this section; that of *Lataillade v. Orena*, 91 Cal. 565, being particularly applicable. This case, to which we shall again have occasion to refer on another point, was a suit for an accounting by a minor against his guardian. It is alleged in the complaint that the guardian from time to time, after April, 1849, until July, 1885, sold property belonging to plaintiff and mingled the funds obtained therefrom with his own, and when his final account was filed he omitted much of the property belonging to the guardian. The defendant pleaded the above subd. 4 of section 338, and in its opinion on this question, the court, at page 577, said:

“It is urged that the action was not one for relief on the ground of fraud. It is true, the action was for an accounting, but the grievance complained of was, that defendant knowingly received and held moneys in trust for plaintiff, and appropriated the same to his own use, and at all times fraudulently concealed from plaintiff the fact that he had ever received or held any such moneys, or any money in which plaintiff had any interest. It seems to us, therefore, that the averments make a case of the class provided for in the section of the code above cited.”

Section 343 above cited provides that all other actions not before provided for in the code must be commenced within four years after the cause of action shall have accrued. The said subd. 4 of section 338 is the only section among those referred to in section 343 that could apply to the case at bar, and as already pointed out, the same does apply and limits the time in which such an action may be brought. Of course, section 343 has no application whatsoever, and this action is not barred by the said section 343.

It is the universal rule laid down by courts of most of the states, and followed by the federal courts, that the defendants' fraudulent concealment of a cause of action will postpone the running of the statute, and is stated in 19th Am. & Eng. Enc. 243, as follows:

“It has always been the rule in equity that the defendant's fraudulent concealment of a cause of action will postpone the running of the statute until such time as the plaintiff discovers the fraud; the defendant having by his own wrong prevented the plaintiff from instituting his suit,

will not be permitted to take advantage of his own wrong by setting up the statute as a defense. This rule is provided for by statute in many of the states, but exists in equity courts independent of statutory provisions.”

This rule is well settled in the courts of California and of Kansas. See:

Kane v. Cook, 8 Cal. 449;

Currie v. Allen, 34 Cal. 254;

Odell v. Moss, 130 Cal. 352;

Duffit v. Tuhan, 28 Kan. 208;

McMullin v. Loan Association, 64 Kan. 298;

Gafford vs. Dickinson, 37 Kan. 289;

McAdow v. Boten, 67 Kan. 126.

As before stated, this rule is followed by our federal courts in many well considered cases. The one being most frequently quoted being that of Bailey v. Glover, 21 Wall. 342; the action being one by an assignee in bankruptcy against the bankrupt's wife to set aside certain conveyances alleged to be fraudulent. The suit was resisted on the ground that the action was barred by the Statute of Limitations. In delivering the opinion of the court Mr. Justice Miller said (page 347):

“In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud.

* * * (349) And we are also of opinion that this is founded in a sound and philosophical view of the principles of the Statute of Limitations. They were intended to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until the party committing the fraud could plead the Statute of Limitations to protect it, is making the law which was designed to prevent fraud the means by which it is made successful and secure."

We might quote from many other cases in which this question is so decided by our federal courts, but feel that it is unnecessary, and we will only refer this court to the case of *Meader v. Norton*, 11 Wall. 442-458.

Unquestionably, the rule that the doctrine of laches never applies to cases of actual fraud also applies where the Statute of Limitations is attempted to be invoked, and where actual fraud exists the running of the statute is stopped until the fraud is discovered.

Fraud Extrinsic and Not Intrinsic.

In support of their motion to dismiss, the defendants at the hearing before the trial court contended that complainants cannot maintain their action for the reason that the fraud complained of is intrinsic and not extrinsic or collateral to the matters determined by the probate court.

This view of the case was taken by the honorable trial court, as shown by his opinion (see pages 51 to 53 of Tr.), and in support of his opinion he cites the following cases:

U. S. v. Throckmorton, 98 U. S. 65;

Pico v. Cohn, 91 Cal. 129;

Hanley v. Hanley, 114 Cal. 690;

Langdon v. Blackburn, 109 Cal. 19;

Fealey v. Fealey, 104 Cal. 354;

Stead v. Curtis, 305 Fed. 439.

As special attention is called to the case of Langdon v. Blackburn in the opinion of the court, we will take time to point out the difference between this case and the case at bar, which difference is readily distinguishable. In the case of Langdon v. Blackburn, *supra*, the averments of the complaint were as follows: James H. Blackburn died January 27th, 1888, leaving a large estate and as his only heirs two brothers and one sister and children of a deceased sister. Prior to his death the said James H. Blackburn became physically and mentally weak and by reason thereof had no volition, mind or will of his own, and while in this condition the defendants conspired together to defraud the sister, Mira Kirschner, out of her portion of her brother's estate, and to that end they procured and caused to be drawn in legal form, a will, in which no mention was made of said sister, Mira Kirschner, and in which all the property was left to defendants, and while the said Blackburn was physically and mentally incapacitated, placed a pen in his hand and by means of some other person caused

his name to be affixed to the will. That on the death of the said Blackburn, the will was probated by the defendants and the property distributed in accordance with its terms. That at that time the sister, Mira Kirschner, was sixty-five years of age, ignorant as to legal and business matters and resided about 400 miles from the residence of her brother, and shortly after the death of Blackburn the defendants, in order to more effectively carry out their scheme to defraud her, caused her son, one Henry Finley, to visit her and represent to her that her interest in the estate of her deceased brother was the sum of \$3000 only. She accepted the said sum of \$3000 as her share of the estate. That thereafter the fraud was discovered, and she, being dead, her administrator, Langdon, brought this action, asking that the defendants be adjudged to hold one-fourth of the estate so received by them in trust for the estate of Mira Kirschner, and for an accounting. The trial court sustained a general and special demurrer to the complaint and the appeal was from judgment thereupon entered. The Supreme Court affirmed the order of the trial court in sustaining this demurrer, and in its opinion followed the Broderick will case, reported at 21 Wall. 503, holding that the probate court had complete and effective probate jurisdiction, and that the court of equity had no jurisdiction to interfere or to pass upon the validity of the will. It also held that the fraud alleged to have been perpetrated upon Mrs. Kirschner was not of such an extrinsic or collateral character as to enable the court to grant the relief asked for.

A comparison of the facts and circumstances of the case of Langdon v. Blackburn with those involved in the case at bar, and an analysis of the principles governing each, will readily disclose a vital distinction. In the Blackburn case, to grant the relief prayed for it would be necessary for the court of equity to review the action of the probate court and set aside its decree admitting the will to probate. In the case at bar no such action would be necessary to grant the relief asked. The complainants only ask that the property belonging to the estate of Ferdinand Fensky that was never accounted for by the administratrix, Jeanette Fensky, and which has since come into the hands of these defendants, be now properly accounted for. This is relief of a character that has always been granted by courts of equity of California and by the federal courts.

The principles laid down in the case of Lataillade v. Orena, *supra*, are peculiarly applicable to the case at bar. The facts of this case have already been stated. On the question of jurisdiction of the court of equity to compel the accounting, the court, at page 576, says:

“The respondent contends that the probate court had exclusive jurisdiction to compel defendant to account as guardian, and that its decree, settling his accounts and discharging him from his trust, was final and conclusive; and in support of this position numerous authorities are cited. This is undoubtedly the general rule applicable to the settlement of the accounts of guardians, executors and administrators, but we do

not think it applicable to a case like this. Here, if the averments of the complaint are true—and they must be assumed to be so for the purposes of this decision—none of the matters now in controversy were passed upon in the settlement, for the reason that the guardian intentionally and fraudulently concealed from the court and his ward the fact that the latter had then or ever had any interest in the property in question. The cases cited state and apply the general rule, but, so far as we have discovered, no one of them goes to the extent of holding that such a settlement can shield a guardian from afterwards being called upon in a court of equity to account for the property so concealed. The rule applicable to the case is correctly stated in *Griffith v. Godey*, U. S. 89. In that case, Mr. Justice Field, in delivering the opinion of the court, said: 'It is well established that a settlement of an administrator's account, by the decree of a probate court, does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such case, open its decree and administer upon the omitted property. And a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity.' (And see *Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, 63 Cal. 473; *in re Cahalan*, 70 Cal. 604; *Tobleman v. Hildebrandt*, 72 Cal. 316.)"

It appears to us that this case, and that of Griffith v. Godey, cited in the opinion, are conclusive upon this question.

A careful analysis of the other cases cited by the honorable trial court in support of its opinion that the fraud complained of was intrinsic will show that in every case referred to some judgment, decree or action of the court previously rendered or taken is sought to be set aside, either actually or in effect, on the ground of some fraud or mistake, and that the facts or matters constituting the fraud were either directly or indirectly passed upon by the court at the time the decree or other action sought to be annulled was rendered.

It will be noted that the complainants in the action at bar do not ask that any decree of court be vacated. They simply ask that the property belonging to the estate of Ferdinand Fensky and Jeanette Fensky that was never inventoried or accounted for, be now accounted for by the holders thereof. No court has ever passed upon the question as to whether or not the property alleged to belong to the estate of Ferdinand Fensky but converted by Jeanette Fensky to her own use and benefit, actually belonged to the estate of Jeanette Fensky or not; nor whether the property attempted to be conveyed in the deeds executed by Jeanette Fensky to the defendants, but not attempted to be delivered until after her death, really belonged to the estate of Jeanette Fensky, or whether or not the grantees under such deeds were accountable to the estate of Jeanette Fensky for the same.

It seems to us that the case at bar comes clearly within the exception laid down in the general rule, as indicated in the opinion of the case of *U. S. v. Throckmorton*, at page 66, using the language of the court:

“—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. See *Wells res adjudicata*, sect. 499; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. De Zoya*, 7 Ill. 385; *Kent v. Ricards*, 3 Md. Ch. 392; *Smith v. Lowry*, 1 Johns. (N. Y.) Ch. 320; *De Louis et al. v. Meek et al.*, 2 Iowa 55.

“In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.”

Even though it be conceded for the sake of argument that the fraud perpetrated upon these complainants by Jeanette Fensky in obtaining the releases of the interests of complainants in the estate of Ferdinand Fensky was intrinsic, yet complainants would not be barred from the relief asked for in this action, for these releases could only bind complainants as to the property actually inventoried and distributed in the estate of Ferdinand Fensky and could not in any way affect their rights in the property actually belonging to the estate of Ferdinand Fensky, but which was never distributed through the estate and which was

fraudulently converted by the said Jeanette Fensky to her own use and benefit.

The distinction we contend for here is indicated in the opinion of the court in the case of *Fealey v. Fealey*, referred to by the honorable trial court in its opinion. In distinguishing between the said case and that of *Wickersham v. Comerford*, 96 Cal. 433, the court uses the following language:

“The conclusion we have reached in this case is not at all in conflict with *Wickersham v. Comerford*, 96 Cal. 433. The action in that case was brought by a creditor of the deceased to annul the order of the probate court setting apart a homestead to the widow of the deceased, the complaint alleging in substance that prior to the death of deceased he and his wife entered into a written agreement for a separation and division of the community property, and that such agreement was completely performed, and that deceased and his wife were at the time of his death living separate and apart, in accordance with the terms of said agreement. Under this state of facts, the widow was not entitled to a homestead out of the estate of her deceased husband. (*Estate of Noah*, 73 Cal. 583; 2 Am. St. Rep. 829.) But the complaint in that action further alleged that in the petition which the widow filed, asking the court to set apart such homestead for her use, she ‘willfully suppressed and concealed from the court’ the fact of the existence of the agreement made between herself and husband for a separation, and that she and the deceased were not living together as husband and wife at the time of his death, and that such con-

cealment was made for the purpose of deceiving the court. It was held in that case that this omission being willful and relating as it did to a material fact which ought to have been brought to the attention of the court and submitted to its judgment, was such a fraudulent concealment as would justify a court of equity in annulling the order setting apart the homestead; but it is clear that the fraud which was made the basis of the action and judgment in that case was extrinsic of the judgment or order annulled. In the original proceeding for a homestead under review in that case the court did not even indirectly pass upon the question of the existence or non-existence of the agreement for separation, and that matter not being before the court, was not concluded by the judgment or order in that proceeding; but, as we have seen, the direct question sought to be litigated here, viz., whether the land set apart to defendant as a homestead was or was not community property, was put in issue in the homestead proceeding, resulting in the order here assailed; and the court, upon the evidence submitted to it at the time of making that order, found the fact adversely to the plaintiff's present contention, and this marks the important distinction between the present and the case of *Wickersham v. Comerford*, 96 Cal. 433."

It appears to us that this case falls clearly within the rule laid down in the cases of *Wingerten v. Wingerten*, 71 Cal. 105; *Lataillade v. Orena*, *supra*; *Carter v. Shell*, 129 Cal. 208; *Griffith v. Godey*, 113 U. S. 89; *Wickersham v. Comerford*, 96 Cal. 439; *Marshall v. Holmes*, 141 U. S. 589.

In this latter case, at page 598, the court says:

“The rules laid down in *Barrow v. Hunton* were applied in *Johnson v. Waters*, 111 U. S. 640, 667, and *Arrowsmith v. Gleason*, 129 U. S. 86, 101. In *Johnson v. Waters*, this court upheld the jurisdiction of the Circuit Court of the United States, by a decree in an original suit, to deprive parties of the benefit of certain fraudulent sales made under the orders of a probate court of Louisiana, which court, by the law of that state, had exclusive jurisdiction of the subject matter of the proceedings out of which the sales arose. After observing that the Court of Chancery is always open to hear complaints against fraud, whether committed *in pais* or in or by means of judicial proceedings, the court said: ‘In such cases, the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment, or decree, it will deprive them of the benefit of it.’ In *Arrowsmith v. Gleason*, the grounds of the jurisdiction of the Circuit Court of the United States to entertain an original suit—the parties being citizens of different states—to set aside a sale of lands fraudulently made by the guardian of an infant, under authority derived from a probate court, are thus stated: ‘These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice in procuring from it authority

to sell an infant's lands when there are no necessity therefor, but actual fraud in the exercise, from time to time. of the authority so obtained. As the case is within the equity jurisdiction of the circuit court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion.' ”

It will be seen from the above that the Federal Courts have adopted a liberal policy in relieving a party from the effects of a judgment or decree obtained by fraud than does our state court.

The facts in the case of *Wingerter v. Wingerter*, *supra*, are similar to those in the case at bar. The plaintiff, who resided in Missouri, was an heir to the estate of his father, who died in Los Angeles county, California. The defendant, as administrator of the estate of the deceased, induced the plaintiff, as heir of his deceased father, through false representations, to convey to the defendant, all his interest in the estate, and afterward procured this interest to be distributed to him by the probate court.

It was held that the plaintiff was entitled to recover; the court, in its opinion, stating, at page 110, as follows:

“This action was not brought to set aside the deeds and decree of distribution but to charge the defendant as an involuntary trustee for the benefit of the plaintiff of the property which he

fraudulently and wrongfully obtained under them.”

In concluding this subject we would again refer to the case of *Pickens v. Campbell*, in which the court specifically held that the fraud complained of, which was based upon the exact facts and circumstances as the case at bar was extrinsic to the issue determined by the probate court and that equitable action in the district court is an appropriate proceeding for relief.

There is No Misjoinder Either as to Subject Matter or Parties.

The bill of complaint has to do with but one single subject, and that is the recovery by complainants of their distributive share of their brother's estate. The assets which they seek to subject to their claims constitute a trust fund in which the defendants claim an interest and possession adverse to the complainants. True, the defendant Merriam is not alleged to have any of this money in his possession, but his liability as for a conversion of any part which the complainants may not be able to recover makes his presence both proper and necessary. He is charged in the complaint with having aided and abetted the defendants Willke, Katzung, Schmidt, Farnsworth and Loveland with securing possession of this trust fund under deed which they all knew were wholly invalid, and with having distributed among them the property belonging to the estate of Mrs. Fensky. Under such circumstances it is highly convenient and proper that he should be made a party to the action, not only for

the purpose of accounting for the assets of her estate but to make full and complete discovery as to what became of them, and as to why they were concealed.

Defendants also except to the bill on the ground of misjoinder for the reason that M. T. Campbell is not made a party to the action. As no relief whatever is asked against Campbell in this action, we can see no reason why he should be made a party to it. His name is mentioned in the bill merely for the information as to the instrumentality employed by Jeanette Fensky to defraud the complainants, and there is no reason whatever for joining him as a party to the action.

We submit that the bill of complaint is not subject to attack for either a misjoinder or nonjoinder of parties or of causes of action.

Bill of Complaint Not Uncertain, Ambiguous or Unintelligible.

The defendants have set up as a ground for dismissal of the complaint that the same is uncertain, ambiguous and unintelligible for various reasons set out in their motion. We do not deem it necessary to take up the time of this court in discussing this ground of defendants' motion, for the reason that even if the complaint were somewhat uncertain, ambiguous or unintelligible in the respects set out in defendants' motion, these uncertainties are not of enough importance as to be fatal to the complaint. A careful reading of the bill of complaint will readily show that all the material facts necessary to state a cause of action of this character are clearly and distinctly set forth,

and we would call the court's attention to the fact that many of the matters of the complaint claimed to be uncertain by defendants are matters peculiarly within the knowledge of the defendants, and hence under the general rule of pleading, the defendants cannot in such matters challenge the bill of complaint.

See:

Schaake v. Eagle Canning Co., 135 Cal. 485;

Harvey v. Meigs, 17 Cal. App. 365.

As to the alleged uncertainties in the complaint to the effect that it cannot be ascertained therefrom what representations or statements were believed by complainants, nor which were false, we would call the court's attention to the fact that the bill of complaint alleges that complainants had no knowledge of the actual facts alleged in the complaint, but relied on said inventories and said representations made to them and believed the same, and for that reason executed the releases to Jeanette Fensky. [See Tr. par. 12, pp. 16 and 17.] We submit that these allegations could have but one meaning, and that is that complainants believed and relied upon all the representations made to them by Jeanette Fensky and Campbell and the representations contained in the inventories filed in the estates, and that their knowledge of the matters alleged in the complaint was based entirely upon these representations.

We think the bill is sufficiently certain to fully apprise the defendants of the details of the alleged fraud and of all the matters which they are required to answer, and we feel that they should be required to

answer, with full explanation of all the facts and circumstances.

We most respectfully submit that the honorable trial court erred in holding:

That the complaint was insufficient and did not state a cause of action, and that the complainants were not entitled to the relief prayed for.

That the court had no jurisdiction over the parties to, or the subject matter of the action, or to determine the suit.

That the complainants were guilty of *laches*, or that the cause of action was barred by any statute of limitation of the state of California.

That the fraud complained of by plaintiffs was intrinsic and not extrinsic.

That there was a misjoinder of parties or causes of action.

That the complaint was ambiguous, uncertain or unintelligible in any respect.

And finally, in making the order granting defendants' motion to dismiss the bill of complaint and in entering the formal decree of dismissal.

And we further submit that complainants are entitled to investigation and trial of the allegations of their complaint.

R. W. KEMP,
DAVIS, KEMP & POST and
D. R. HITE,

Attorneys for Complainants and Appellants.

SUPPLEMENT TO BRIEF.

No. 20,095.

Louisa Pickens and Johanna Schutt, appellees, v. M. T. Campbell, revived in the name of Donald A. Campbell, as administrator with the will annexed, etc., *et al.*, appellants.

Appeal from Shawnee county. Division No. 2. Affirmed.

The opinion of the court was delivered by Mason, J.:

Ferdinand Fensky, a resident of California, died intestate and without issue, August 7, 1903. By the laws of that state his heirs were his wife, who was entitled to half his property, five sisters, two brothers and a nephew, who were each entitled to one-sixteenth of it. The widow was appointed administratrix by a California court. M. T. Campbell was appointed administrator in Kansas. He filed an inventory showing something over \$20,000 of personal property in his hands. He paid \$1000 to each of the collateral heirs named and received from them writings releasing all claims against the estate in favor of the widow. These releases were filed in the probate court, together with a receipt from the widow for the remaining assets shown by the inventory, and in June, 1905, an order was made closing the estate. On May 15, 1914, two of the intestate's sisters brought an action against the administrator and his bondsmen to have the settlement set aside for fraud, and for an accounting of the assets with which he was chargeable. The administrator has since died and his representative has

been substituted. A demurrer to the petition was overruled, and the defendants appeal.

In addition to the facts already stated the petition makes these allegations: Fensky had at one time owned various tracts of real estate in Kansas, including what is known as Fensky's Addition to Topeka, the record title to which stood in his name at his death, but which in fact he had sold, taking notes and contracts for the deferred payments, and holding executed deeds for delivery upon their payment. These notes, contracts and deeds, after the death of Fensky, were sent by the widow to the Kansas administrator, who inventoried none of them, but accounted for them to her. He induced the collateral heirs to execute the releases referred to by falsely representing to them that the Kansas real estate had not been sold and that the entire personal estate left by Fensky amounted to about \$20,000. Other notes than those inventoried came into the hands of Campbell as part of the estate and were by him collected, the proceeds being paid to the widow. The plaintiffs never knew of the existence of the contracts of sale or the uninventoried notes until after July, 1912.

1. The defendants maintain that the order of settlement has the force of a judgment and is not open to attack by the method here pursued. The allegation however is that the settlement was procured without an actual accounting as to the claims of these plaintiffs, by the use of a release of all demands against the estate (including that in California as well as that in Kansas) which has been obtained by intentionally false statements concerning facts which affected its

value, particularly by the representation that the Kansas real estate had not been sold by Fensky, in which case the entire title would of course have vested in his widow upon his death. A fraud so accomplished we regard as extrinsic to the issue determined by the probate court and therefore capable of forming a basis for setting aside its order. (See *Plaster Co. v. Blue Rapids Township*, 81 Kan. 730, 106 Pac. 1079, note 106 Am. St. Rep. 640-642, 645-647.) In the United States District Court for the Southern district of California these plaintiffs brought an action for an accounting founded on the same facts against the successors in interest of Fensky's widow, who had died in the meantime. A motion to dismiss it was sustained. A copy of a memorandum opinion, which appears not to have been published, shows that the court concluded that the fraud complained of was not of such a character as to warrant setting aside the probate court orders, because it was intrinsic with respect to the matter determined, inasmuch as the probate court presumably passed on all the things it would have had to consider if the releases had not been executed, including the extent and value of the estate, excepting that it was not required to decide the exact proportion to which the plaintiffs were entitled. The allegations in the two cases may not have been precisely the same. Here it would appear that the use of the releases, together with the receipt of the widow and domiciliary administratrix, made it unnecessary to make any decision concerning the disposal of the assets with which the ancillary administrator was chargeable. Various Kansas cases support

the view that the order of the probate court is open to attack on the ground of the kind of fraud alleged, and that an equitable action in the district court is an appropriate proceeding for the purpose.

(Klemp v. Winter, 23 Kan. 699;

Gafford, *Guardian*, v. Dickinson, *Adm'r*, 37 Kan. 287, 15 Pac. 175;

Carter v. Christie, 57 Kan. 492, 46 Pac. 964.)

The joinder of the bondsmen as defendants is proper. (Fincke v. Bundrick, 72 Kan. 182, 83 Pac. 403.) The defendants urge that this is a collateral attack on the judgment, because other relief is sought than its vacation, and quote in support of the contention this and similar tests: "If the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, the attack upon the judgment is collateral." (23 Cyc. 1063.) The meaning obviously is that in order for an action to constitute a direct attack on a judgment, its vacation must be sought as an end in and of itself and not as a mere incident to something else. The circumstance that additional relief is asked cannot affect the matter.

The statute seems to contemplate that the net proceeds of the property of a non-resident intestate administered in this state shall in accordance with the usual practice be paid over to the foreign administrator. (Gen. Stat. 1909, 3610.) But while the heirs may have had no absolute right to a distribution at the hands of any one except the domiciliary administratrix, the funds in the hands of the ancillary ad-

ministrator were subject to the control of the court and might in some circumstances have been ordered paid directly to the final beneficiaries.

(13 A. & E. Encycl. of L. 938, 940;

18 Cyc. 1235;

11 R. C. L. 441.)

A direction to turn over all the assets to the widow, although she was also the domiciliary administratrix, if procured by the use of a release obtained by fraud, cannot be a bar to a further inquiry as to their proper disposition. The petition states grounds sufficient to justify setting aside the order of final settlement by virtue of its allegations of intentional fraud. (23 Cyc. 1022.) Ordinarily the right to the purchase price of land, contracted to be sold but not conveyed at the time of the vendor's death, passes to his personal representative and not to his heirs.

(Gilmore v. Gilmore, 60 Kan. 606, 57 Pac. 505;

18 Cyc. 187;

11 R. C. L. 124;

Note, 57 L. R. A. 646.)

The petition contains nothing to suggest a different rule here, but if the evidence should show that the administrator believed that the notes therein referred to followed the rule of real estate and became the property of the widow, no statements made by him in good faith by reason of that belief, however incorrect from a legal point of view, would warrant a reopening of the administration. The extent of recovery if the allegations of the petition should be proved is not involved in this proceeding.

2. The defendants assert that the action (as to the sureties at least) is one on the bond of the administrator and has been barred by the five-year statute of limitation. (Civ. Code, sec. 17, subdiv. 50.) The plaintiffs contend that it is one for relief on the ground of fraud, properly brought within two years after the discovery. (Civ. Code, sec. 17, subdiv. 3.) To bring it within the latter classification the fraud must be the basis of the action. (25 Cyc. 1178, 1182.) The mere fraudulent concealment of facts giving rise to a right of action for damages for the violation of a contract has been held by this court not to suspend the statute. (Railway Co. v. Grain Co., 68 Kan. 585, 75 Pac. 1051.) Elsewhere there is a difference of judicial opinion as to whether such conduct will postpone the running of the statute against an action at law (25 Cyc. 1214), while there is a general agreement that such is the effect with reference to a suit in equity. (19 A. & E. Encycl. of L. 243; 25 Cyc. 1214.) In this state the statute of limitations applies equally to legal and equitable cases. (Chick *et al.* v. Willets, 2 Kan. 384.) In the present action however the requirement that the fraud practiced must be the foundation to the action is fully met. The relief asked is essentially the setting aside of the releases because they were procured by fraud, the vacation of the settlement which was based upon them, and the restoration of the rights thereby denied. If the running of the statute was suspended as to the administrator it was suspended as to the bondsmen as well. (25 Cyc. 1186.)

3. The argument is also advanced that the facts pleaded show that by the exercise of reasonable diligence the plaintiffs could have learned of the matters alleged to have been concealed, and therefore must be deemed to have had constructive knowledge of them. The plaintiffs allege in general terms that they had no means of knowing the facts, and we do not think any of the details stated are in necessary conflict with that allegation. It is suggested that inquiry of the purchasers of lots in the Topeka addition would have disclosed that they had bought them from Fensky and were indebted to him for the purchase price at the time of his death, but in the absence of anything to excite suspicion on the subject it cannot be said as a matter of law that the plaintiffs were under an obligation to make such an investigation. In the federal case referred to the court reached a different conclusion in this regard, which obviously resulted from a less liberal interpretation of the allegations of a pleading than the practice in this state requires where the attack is by demurrer.

4. The contention is made that the petition is demurrable because it merely alleges that the plaintiffs did not know of the facts pleaded until July, 1912, and does not state how the discovery came about. The general rule appears to be that such a statement is required. (25 Cyc. 1418; *Hardt v. Heidweyer*, 152 U. S. 547.) But the contrary practice obtains in some of the states, including Kansas. (*K. P. Ry. Co. v. McCormick*, 20 Kan. 107; 25 Cyc. 1419.)

The order overruling the demurrer is affirmed. All the justices concurring.

No. 2783.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Louisa Pickens and Johanna Schutt,
Appellants,

vs.

J. H. Merriam, Eugene Wellke,
Alma J. Schmidt, Amanda Kat-
zung, Minnie S. Farnsworth,
Corrine Loveland and Don
Ferguson,
Appellees.

BRIEF OF APPELLEES.

Upon Appeal from the United States District Court
for the Southern District of California, Southern Di-
vision.

WM. J. HUNSAKER,
E. W. BRITT,
LEROY M. EDWARDS,
JOSEPH L. LEWINSOHN,
J. H. MERRIAM.
1132 Title Insurance Building,
Los Angeles, California,
Solicitors for Appellees.

Filed

OCT 2 - 1916

F. D. Monckton

Clk

No. 2783.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Louisa Pickens and Johanna Schutt,
Appellants,

vs.

J. H. Merriam, Eugene Wellke,
Alma J. Schmidt, Amanda Kat-
zung, Minnie S. Farnsworth,
Corrine Loveland and Don
Ferguson,

Appellees.

BRIEF OF APPELLEES.

PREFATORY STATEMENT.

It will be unnecessary for us to make an extended statement of the case, but the following chronology may be of assistance to the court:

Aug. 7, 1903. Ferdinand Fensky died. [Tr. p. 5.]

Oct. 15, 1903. Jeanette Fensky was appointed administratrix of the estate of Ferdinand Fensky, deceased, by the Superior Court of Los Angeles county. [Tr. 8.]

Sept. 9, 1903. M. S. Campbell was appointed administrator of said estate in Kansas by the probate court of Shawnee county. [Tr. 10.]

Oct. 22, 1903. Campbell filed his inventory. [Tr. 10.]

July 29, 1904, and Aug. 3, 1904. Plaintiffs executed their deeds of release of all interest in said estate. [Tr. 16-17.]

Mar. 30, 1905. Jeanette Fensky filed her final account, which was received and approved by the court and she was forthwith discharged as administratrix. [Tr. 18.]

Sept. 18, 1907. Jeanette Fensky executed and delivered deeds to certain of defendants. [Tr. 21.]

July 8, 1908. Jeanette Fensky died. [Tr. 21.]

Aug. 1, 1908. Defendant J. H. Merriam appointed administrator of estate of Jeanette Fensky by the Superior Court of Los Angeles county. [Tr. 22.]

Sept. 8, 1909. Defendant Merriam filed his inventory and final account. [Tr. 22.]

July, 1912. One of daughters of complainant Louisa Pickens secured access to correspondence between Campbell and Jeanette Fensky. [Tr. 27.]

July 8, 1914. Appellants filed their bill of complaint. [Tr. 32.]

Appellants have discussed several propositions in their brief which it will not be necessary for us to notice. The appellees will address themselves exclusively to three points, any one of which is decisive of this appeal. The first point is that plaintiffs' pretended cause of action is barred by the statute of limi-

tations. The second point is that plaintiffs have been guilty of laches. The third point is that the alleged fraud complained of by appellants is intrinsic in character and not extrinsic, and, therefore, insufficient to move a court of equity to disregard the decrees in probate.

I.

Plaintiff's are Barred by the Statute of Limitations.

The gist of the matter with reference to appellees' first point is that the bill of complaint does not state a cause of action, because it fails affirmatively to disclose facts and circumstances excusing plaintiffs from commencing their suit within three years.

The statutory period within which an action may be brought for relief on the ground of fraud is three years, and "the cause of action in such case [is] not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (Code of Civil Proc., sec. 338, subd. 4.) The provision of the statute regarding discovery is derived from the principles of equity jurisdiction. The rule in equity is that knowledge of facts which would put a reasonably prudent man upon inquiry is equivalent to discovery, and our statute and similar statutes have been construed in the light of this rule. (*Rugan v. Sabin*, 53 Fed. 415, 419 [C. C. A. 8th Cir. 1892]; *Redd v. Brun*, 157 Fed. 190, 192 [C. C. A. 1907]; *Lady Washington Cons. Co. v. Wood*, 113 Cal. 482 [1896]. As was said by Sawyer, J., in *Norris v. Hag-*

gin, 28 Fed. 275 [C. C. D. Cal. 1886, affirmed in 136 U. S. 386]:

“To ascertain of what acts a discovery of the facts constituting the fraud affording the ground for relief consists, we must go to the principles established in equity law, whence the idea was derived.”

28 Fed. 280.

When the bill of complaint was filed, almost eleven years had elapsed since the commission of the initial fraud upon which the cause of action is attempted to be grounded. Almost five years had elapsed since the last decree in probate. The statutory period had run several times over. *Prima facie* plaintiffs' alleged cause of action was barred. The only ground on which plaintiffs can ask the court to investigate their claim is that they excusably failed to discover the frauds complained of within three years. Does the bill of complaint disclose such a case?

Let us inquire as to the principles governing the manner of stating a cause of action such as plaintiffs have attempted to plead.

In the leading case of *Wood v. Carpenter*, 101 U. S. 135 [1879], the principles are stated as follows:

“In this class of cases the plaintiff is held to stringent rules of pleading and evidence, ‘and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might

not have been before made.' *Stearns v. Page*, 7 How. 819, 829. * * *

"A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. *Carr v. Hilton*, 1 Curt. C. C. 220.

"The fraud intended by the section which shall arrest the running of the statute must be one that is secret and concealed, and not one that is patent or known. *Martin, Assignee, etc., v. Smith*, 1 Dill. 85, and the authorities cited.

" 'Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.' *Kennedy v. Greene*, 3 Myl. & K. 722. 'The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.' *Angell, Lim.*, sec. 187 and note.

"A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it."

101 U. S. 140-141.

In *Lady Washington Cons. Co. v. Wood*, 113 Cal. 482 [1896], it was said:

"It must appear that he did not discover the facts constituting the fraud until within three

years prior to commencing the action. This is an element of the plaintiff's right of action, and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. 'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. * * * He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged; and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts."

113 Cal. 486, 487.

In what manner have plaintiffs undertaken to discharge the obligation resting on them affirmatively to state with definiteness and particularity how and when they discovered the alleged fraud and why they did not sooner discover it? Plaintiffs' attempt to plead such matter is found in paragraph XVI of the bill of complaint. That paragraph reads:

“Complainants aver that until late in the summer of 1912 they did not, nor did either of them, have any notice, knowledge or suspicion of the truth respecting the amount, extent and value of the estate of their deceased brother, nor of the frauds and fraudulent conduct of the said M. T. Campbell, the said Jeanette Fensky, and the said J. H. Merriam, nor did either of them have any notice, knowledge or suspicion of the truth respecting the undelivered deeds made by the said Jeanette Fensky in her life time, to the defendants herein, as heretofore stated; that during the month of July, 1912, one of the daughters of the complainant Louisa Pickens, while visiting in Los Angeles, California, accidentally secured access to the correspondence between the said M. T. Campbell and the said Jeanette Fensky, which disclosed to said daughter a part of the truth relative to the estate of Ferdinand Fensky, and the dealings of the said Campbell and the said Jeanette Fensky in reference thereto; that the undelivered deeds signed by the said Jeanette Fensky were recorded a few days after her death, but were made and acknowledged several months before she died; that until in the early part of 1913, neither of the complainants had any notice or knowledge that said deeds were not delivered during the lifetime of Jeanette Fensky, although the complainants had knowledge of the contents of the inventories filed by the said Campbell, the said Jeanette Fensky and the said Merriam; that these complainants, through their children and otherwise, during the pendency of the proceedings in said probate court of Shawnee county, Kansas, and during the pendency of the proceedings in the Superior Court of

Los Angeles county, California, involving the administration of the estate of the said Ferdinand Fensky and of the said Jeanette Fensky, paid attention to said proceedings, and from time to time secured copies of papers that were filed therein; that none of said papers and none of the records disclosed the truth as your complainants now aver it to be, and their present knowledge concerning the extent and value of the estate of their deceased brother, and of the facts relating to the estate of the said Jeanette Fensky has been secured since the discovery of the correspondence between the said Campbell and the said Jeanette Fensky, which aroused the suspicion of complainants and caused them to and they have used extraordinary efforts to learn the facts. And complainants aver that they believed the statements contained in the said inventories and believed the representations made to them by the said Jeanette Fensky, and by the said Campbell and by the said Merriam; and aver that except for such representations they would not have released the estate of said Ferdinand Fensky from their just claims, but would have enforced the same." [Trans. pp. 26-28.]

The object of plaintiffs' bill is to recover "their distributive share of the estate of their deceased brother," Ferdinand Fensky (par. 3). The basis of the cause of action stated is the alleged fraud and false representations of Jeanette Fensky, his widow, in making, as administratrix of his estate, an untrue and incomplete return and inventory of his property in California, in conjunction with similar representations by one Campbell, her agent, who, as administrator in Kansas, falsely

represented to plaintiffs the nature and extent of the estate there situated. It is claimed that by reason of these false representations made directly to plaintiffs, and also in the two inventories, plaintiffs were induced to execute a deed of release of all of their interest in the estate. The other defendants are alleged to be grantees in deeds executed by Jeanette Fensky prior to her death (but not delivered until after her death), without consideration, conveying property which in fact belonged to the heirs of Ferdinand Fensky, except the defendant Merriam, who, as administrator of the estate of Jeanette Fensky, is alleged to have filed a false and incomplete inventory.

It will be observed that complaint is made of matters which transpired as long ago as 1903. It is alleged that "late in the summer of 1912" plaintiffs had no notice or suspicion of the fraud which they now claim was practiced on them. (Par. 16.) In describing how the alleged fraud came to be discovered it is said that a member of their family "accidentally secured access to the correspondence between the said M. T. Campbell and the said Jeanette Fensky," which disclosed a *part* of the true state of affairs. It is not alleged *what part of the fraud* was thus discovered nor how the other facts came to the knowledge of plaintiffs; neither does it appear that at the time of Ferdinand Fensky's death plaintiffs made any inquiry among the friends, neighbors or advisors of the deceased regarding the extent or character of his property; nor that they made investigation among the real estate men of Topeka regarding the Fensky addition.

From the allegations in the complaint, it is submitted, the court can plainly see that by the exercise of ordinary diligence all of the facts constituting the alleged fraud could have been discovered many years ago and immediately after the transaction took place. It is alleged that plaintiffs watched the court proceedings, took copies of papers and knew the contents of the inventories filed in the estate of both Ferdinand Fensky and Jeanette Fensky. It is alleged that the fraudulent deeds of Jeanette Fensky were recorded "a few days after her death." Plaintiffs have known of this, for their allegation is that they did not know until early in 1913 that these deeds *had not been delivered*. Knowing that Jeanette Fensky had no property other than that which she had acquired by descent from her husband, plaintiffs also knew in 1908 at the very latest that she was in possession of all the property which was the subject-matter of this action. Their delay at least since that time is inexcusable.

The learned trial judge reached the conclusion that the bill of complainant did not show the delay of plaintiffs was excusable. He said:

"Even in the case of the fraud charged, it is clear that many of the things alleged to have been misrepresented or concealed must have been within the knowledge of complainants. They were sisters of the intestate; they must have had information as to when he married, whether his property was obtained previous thereto, and whether or not it was separate or community property.

It is clear from allegations in the complaint

that much of the valuable property in Topeka, Kansas, was a part of an addition in that city bearing the intestate's name; one of the complainants resided in that city and it surely must be true in spite of allegations seemingly pointing to the contrary, that she knew of the fact of property being owned there by her brother, and it is fair to assume that if such property constituting such 'an addition' as is referred to had been sold as city or town lots under contract, that some or much of it had been improved by the vendees thereof, and it consequently must have come to her that such vendees or presumed occupants in possession, went into possession under some claim of title or contract of sale, and that, in *consequence*, *must* have known that the moneys derivable therefrom at the time of the death of the deceased, could not, under the Kansas law as alleged in the bill, have descended by succession to the widow. In spite of all this information which it must be presumed complainants had, there was a delay from 1903, the date of death of the intestate until July, 1914, a period of almost eleven years, before suit was brought. During that time not only had the years run as just indicated, but conditions and circumstances had changed. The estate of complainants' brother had been entirely administered. Except what came to complainants as set forth in the bill, it had passed by distribution to the wife of the intestate, she in turn had deceased, and all of her property has been either by conveyance or distribution passed to other persons who are now made defendants in this proceeding." [Trans. 50-51.]

The view taken by the learned trial judge is sustained by the authorities.

In *Wood v. Carpenter*, 101 U. S. 135, the facts are thus succinctly stated in the syllabus:

“A, who had recovered judgment in 1860 in a court of that state against B, brought suit in 1872, alleging that the latter, in 1858, in order to defraud his creditors, confessed judgments, incumbered his property, and in 1862 transferred his real and personal estate to sundry persons, who held the same in secret trust for him; that on being arrested in 1862, upon final process to compel the payment of A’s judgment, he deposed that he was not worth twenty dollars, and had in good faith assigned all his property to pay his creditors; that A, believing the statement, and relying upon the representations of B, that C, his son-in-law, would with his own means purchase the judgment for fifty cents of the principal and interest, sold it in 1864 to C; that he has since discovered that the money he received therefor belonged to B; that the latter has now an indefeasible title to the property; and that said judgment has been entered satisfied.”

101 U. S. 135.

The statute of limitations was six years with the usual further period “if any person liable to an action shall conceal the fact from the person entitled thereto.” The defendant filed an answer and the plaintiff a replication. In the replication it was averred:

“* * * that the concealment was effected by the defendant by means of fraud, perjury, and the

other wicked devices set forth and described in the plaintiff's complaint herein; and that the plaintiff had no knowledge of the facts so concealed by the defendant until the year 1872, and a few weeks only before the commencement of this suit."

101 U. S. 138.

A demurrer to the replication was sustained and defendant had judgment, which was affirmed by the Supreme Court. The court said in part:

"Upon looking carefully into the reply, we find it sets forth that the concealment touching the cause of action was effected by the defendant by means of the several frauds and falsehoods averred more at length in the complaint. The former is only a brief epitome of the latter. There is the same generality of statement and denunciation, and the same absence of specific details in both. No point in the complaint is omitted in the reply, but no new light is thrown in which tends to show the relation of cause and effect, or, in other words, that the protracted concealment which is admitted necessarily followed from the facts and circumstances which are said to have produced it.

"It will be observed also that there is no averment that during the long period over which the transactions referred to extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams. The conveyances to Alvin and Keller were also on record in the proper offices. If they were in trust

for the defendant, as alleged, proper diligence could not have failed to find a clew in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort.”

101 U. S. 139-140.

In *Redd v. Brun*, 157 Fed. 190 (C. C. A. 8th cir. 1907), a suit by a judgment creditor to set aside his debtor's conveyance to the latter's sister, the court said:

“This suit was instituted more than five years after the deeds assailed were spread upon the public records. The statute barred suits for relief against frauds in three years after the discovery of the facts which would awaken a person of reasonable prudence to an inquiry which would lead to their discovery. In the face of this statute, reasonable diligence required that the complainant, who suspected conveyances of real estate would be made or procured by Tillett for the purpose of concealing his property and defrauding his creditors, should examine the public records in his name, which would be likely to disclose and which did disclose such conveyances, at least once in three years. He failed to make this search, and to inquire among Tillett's neighbors and friends so as to ascertain his relationship to Mrs. Stortes, until the statutory time had passed. The burden was upon him in this suit to show some sound reason why he did not make this search and inquiry in less than four years after the means of discovering the fraud were within his reach, and why a court of equity should refuse to apply its doc-

trine of *laches* until more than two years after the statutory limitation upon a like action had expired. He did not successfully bear this burden. He failed to establish any reasonable excuse for his postponement of his inquiry and search for more than four years after these deeds had been recorded. If by a failure to make the search and inquiry after the public record disclosed the means of discovery he could toll the limitation of the statute two years beyond the statutory time, it is not perceived why by a continued failure he might not toll it indefinitely; and as no equitable reason has been shown why the doctrine of *laches* should not be applied after the expiration of the limitation, the complainant has no standing in equity. He was guilty of *laches* which bars his suit, and the decrees below must be affirmed."

157 Fed. 194-195.

Appellants rely upon the following cases:

Lataillade v. Orena, 91 Cal. 565;

Kane v. Cook, 8 Cal. 449;

Currey v. Allen, 34 Cal. 254;

Odell v. Moss, 130 Cal. 352;

Duffitt v. Tuhan, 28 Kan. 292;

McMullin v. Loan Association, 64 Kan. 298;

Gafford v. Dickinson, 37 Kan. 287;

McAdow v. Boten, 67 Kan. 136;

Bailey v. Glover, 21 Wall. 342;

Meador v. Norton, 11 Wall. 442.

The case of Lataillade v. Orena, *supra*, is sufficiently distinguished from the case at bar by the following paragraph in the opinion:

“It must be observed that the relations of the parties were such as would naturally inspire trust and confidence on the part of the plaintiff in the defendant. The defendant was plaintiff’s step-father and guardian, and brought him up in his own family and as his own son. Plaintiff always, up to the time of the rupture in 1885, placed implicit confidence in whatever defendant told him, and never doubted its truth. He had no knowledge, and no reason to suspect, that a fraud was being practiced upon him. There was nothing, therefore, to put him upon inquiry, and under such circumstances we do not see how it can be said that he failed to use due diligence to detect the fraud, or how he can be presumed to have known anything concerning it.”

91 Cal. 578.

In *Kane v. Cook*, *supra*, and *Currey v. Allen*, *supra*, the doctrine of the court is that where relief is sought on the ground of fraud the statute of limitations does not commence to run until the discovery of the fraud. In *Odell v. Moss*, *supra*, it is held that in case of an express trust, the statute does not commence to run in favor of the trustee until a repudiation of the trust is brought home to the *cesti que* trust. The question of diligence was not involved or considered in any of these cases.

In *Duffitt v. Tuhon*, *supra*, the court applied the rule that the statute does not begin to run until fraud is discovered, adding that “for this purpose there is no constructive discovery.” (Page 299.) This case is contrary to the cases in the Federal courts and

courts of equity generally, as explained above. In *McMullin v. Loan Association*, *supra*, the statutory period was five years and the action was brought within six years. The fraud consisted of false entries and statements in written reports by a secretary. The secretary's reputation for honesty and integrity during the time he was in charge of the office was good. Plaintiffs had no knowledge of the fraud until about a month prior to the commencement of suit. It was held that the facts did not put them upon inquiry. In *Gafford v. Dickinson*, *supra*, and *McAdow v. Boten*, *supra*, no question touching the statute of limitations was involved or discussed.

In *Meader v. Norton*, *supra*, the facts were entirely dissimilar to the facts here. The only statement that has any possible relevancy is the statement at the close of the opinion:

“*Laches* and the statute of limitations are set up in argument, but such defense cannot prevail where the relief sought is grounded on a charge of secret fraud, and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered.”

20 Law Ed. 188.

In *Bailey v. Glover*, *supra*, which involved the question whether the two-year statute of limitations in bankruptcy commenced running against a fraudulent transfer until discovery, the court applied the rule in equity. Speaking through Mr. Justice Miller, it was said in part:

“We also think that, in suits in equity, the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.”

22 Law Ed. 638.

II.

Plaintiffs Have Been Guilty of Laches.

Practically everything that has been said above regarding the statute of limitations is equally applicable under the present heading, because, in determining whether or not a claim is stale, courts of equity follow the analogy of the statute; and if the statutory period has run, “the burden is on plaintiff to show why it should be extended. It is on the complainant to show by suitable averments in his bill that it would be inequitable to apply it to his case.”

Kelley v. Boettcher, 85 Fed. 55, 62 (C. C. A., 8th Cir., 1898).

The same strict rules of pleading discovery, stated above, obtain when the issue is *laches*.

Hardt v. Heidweyer, 152 U. S. 547, 558-559 (1893).

Appellants urge, however, that the defense of *laches* is not available unless the lapse of time has resulted

in prejudice to the defendants (their brief, pp. 36-38.) It is true that mere lapse of time, generally speaking, is not enough to show *laches*; but prejudice may be presumed from lapse of time,

Cahill v. Superior Court, 145 Cal. 42, at 48 (1904),

or from other circumstances showing that a change in position *might* have occurred.

McNeill v. McNeill, 170 Fed. 289 (C. C. A., 9th Cir., 1909).

If it appears that an important witness has died, that sufficiently shows prejudice.

Hinchman v. Kelley, 54 Fed. 63, at p. 66 (1893), (C. C. A., 9th Cir.);

Foster v. Mansfield Co., 146 U. S. 88, at p. 100 (1892);

Socrates etc. v. Realty Co., 130 Fed. 293, at p. 297 (C. C. A., 9th Cir., 1904).

A marked increase in value of the property, which will be presumed from a marked increase in population, together with lapse of time shows *laches*.

Gallihew v. Cadwell, 145 U. S. 368 (1892).

As already pointed out, about eleven years elapsed between the time of the alleged fraud and the filing of plaintiff's bill of complaint. During that time the property was the subject of conversion and reconversion. There were three decrees in probate and Jeanette Fensky, who is charged to have been the prime mover in the alleged fraud, died. A large part of the estate consisted of real property situated in Los Angeles and

San Pedro, which having greatly increased in population. These facts show a change in position.

A reference to the cases will show not only that the circumstances disclosed by the bill of complaint do not negative *laches* with the definiteness required by law, but that they affirmatively convict plaintiffs of *laches*.

The case of Phelps v. Grady, 168 Cal. 73 (1914), is strikingly similar to the case at bar on its facts. In that case it appeared that plaintiff had purchased the interest of certain interveners in an estate. The interveners alleged that they had been prevailed upon to sell their interest by false representations of the plaintiff as to the nature and extent of the property belonging to the estate. Eight years having elapsed since the frauds and five years since a decree in probate, it was held the interveners were guilty of *laches* in not sooner pressing their claims because they had knowledge of sufficient facts to put them upon inquiry.

The controlling facts are thus stated in the opinion:

“* * * they allege that in January, 1904, Josephine A. Phelps, plaintiff herein, opened negotiations with them by correspondence for the purchase of their interest in her husband's estate. She represented to them that the value of the estate was about ninety thousand dollars, and that the value of the entire portion of the estate devised and bequeathed to Phoebe W. Daughaday was only about \$3333.33. They aver that these representations were false and untrue and were known to Mrs. Phelps to be false and untrue, and were made by her for the purpose of deceiving them. Certain other false representations are de-

clared. It is said that Mrs. Phelps represented that on account of the condition of the estate distribution could not be had for many years; and that the family allowance of four hundred dollars a month decreed by the court would, during the progress of the administration, consume a large portion of the estate. The interveners further allege that Mrs. Phelps was the widow of their mother's brother and that because of this relationship they believed that she would deal with them in all respects fairly and justly, and that so believing they relied upon these representations and parted with their interest to her * * * But in this case the conveyance was executed in 1904. The decree of final distribution in the estate of Timothy Guy Phelps was given in 1907. This action was commenced in 1912, and here for the first time interveners are found asserting the right to avoid their conveyance because of its fraudulent procurement."

168 Cal. 77.

The allegations of the complaint touching discovery are thus stated in the opinion:

"That interveners herein did not discover that the representations made to them by said Josephine A. Phelps, as alleged in paragraphs VII and VIII of this complaint in intervention were untrue nor did they nor any of them have any truthful information concerning the matters and subjects covered by said representations until about the month of October, 1911. That on or about the 1st day of October, 1911, said interveners were informed for the first time that some time in the year 1907 said Josephine A. Phelps had entered

into a contract to sell a certain portion of the real estate to Timothy Guy Phelps, and a part of the real property described in the complaint herein at a price which seemed to indicate that the value of the entire estate of Timothy Guy Phelps, deceased, was in and during the year 1904 very much greater than had been represented to interveners as above related by said Josephine A. Phelps. That thereupon said interveners made inquiry and investigation and were informed that in and during the year 1904 the estate of Timothy Guy Phelps, deceased, was of a value many times greater than \$90,000.00.' ”

168 Cal. 78-79.

The court made the following observations upon these averments:

“Frauds are infinite in their variety, and while the rules of equity apply equally to all, when the doctrine of *laches* or stale demand is invoked, and the question involved is why was not the discovery earlier made, each case must be interpreted and construed under its own facts. * * * The false representation it is asserted was as to the value of the lands of the estate, which lands were situated in a populous county adjacent to the city and county of San Francisco. The fact that the estate owned these lands is not only not questioned but is declared. While it is conceivable that a person under such circumstances might misrepresent to another at a distance the value of those lands, it is impossible that that person could have concealed from the grantors knowledge of the true value had the slightest inquiry been made. It cannot be said, therefore, and of course it is not

alleged, that Mrs. Phelps ever did or attempted to do anything to conceal from these interveners knowledge of the true value of the land. If, under such circumstances, with every means of information open and patent before them, they may refuse to make inquiries for seven years, they may do so for seventy. There is an absolute failure to show not only due diligence but any diligence in seeking to discover during all this intervening time whether or not they had parted with their property at a fair valuation. The fact that they lived at a distance is of course no excuse. They were under no other disability.”

168 Cal. 79-80.

In *Hardt v. Heidweyer*, 152 U. S. 547 (1893), an action was brought in 1889 by creditors for relief against a fraudulent conveyance alleged to have been made in 1884; and executions levied at the same time upon fraudulent judgment notes.

An amendment to the complaint “intended to cover the objection of *laches*” (p. 551) alleged that at the time of the frauds and at all times since complainants were residents of the city of New York while defendants were residents of the city of Chicago; that immediately after the entry of the judgments complainants caused an investigation to be made and were lulled into inaction by false statements of defendants. It was further alleged:

“ ‘A long time afterwards and within, to-wit, less than one month from the time of bringing this suit, your orators for the first time learned not only that said judgments covered and took all

the tangible property of said Heidweyer & Stieglitz, but that the entry thereof was procured by them for the express purpose of preferring said judgment creditors, and that at the same time they transferred all their remaining property to a trustee for the benefit of creditors, as heretofore in this bill alleged, thereby creating an assignment, as herein alleged.' ”

152 U. S. 552.

After quoting from several cases, the court quoted the following from *Wood v. Carpenter*, 101 U. S. 135, 140:

“ ‘A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner.’ ”

152 U. S. 559-560.

The court continued:

“Tested by this rule, it is apparent that this bill must be held deficient in not showing how knowledge of the wrongs complained of was obtained by the plaintiffs. It is alleged that they were ignorant, and now have knowledge; and that they acquired such knowledge within a month prior to bringing the suit; but how they acquired it, and why they did not have the same means of ascertaining the facts before, is not disclosed.”

152 U. S. 560.

After disposing of certain of the allegations, the court proceeded:

“There remains, therefore, as the concealed wrongs, only these matters: First, that the judgment notes were in excess of the real demands; second, that Heidweyer & Stieglitz transferred their bills and accounts receivable in trust to Florsheim, and that that trust included an individual debt of one of the partners. That the plaintiffs knew of the existence of these bills and accounts is shown, and their alleged ignorance is only of the fact of their transfer in trust.

“Now, it is a matter of common experience that when there is so pronounced a failure on the part of a firm carrying such a large stock, there is made by the creditors a thorough examination of the situation. That such an examination, if made, would disclose any substantial difference between the true indebtedness to these preferred creditors and the amount of the notes given to them seems reasonably certain, and if no such examination was made, it indicated indifference on the part of the other creditors. If the plaintiffs relied on the mere statements of these defendants, why did they cease to rely upon such statements, and how did they become advised of their untruth? So, with reference to the bills and accounts receivable; knowing what they were, they could easily have ascertained whether they were collected, and if so, by whom. If collected by other than their debtors, that fact certainly should have provoked inquiry. If collected by the debtors, why were the moneys received not appropriated in payment of other than the preferred claims?

“These are matters in respect to which the bill fails to enlighten us. Indeed, so far as disclosed, it would seem that when the debtors failing, and failing for so large a sum, appropriated all their

tangible property to the payment of a few of their creditors, the others, including these plaintiffs, accepted the situation, and made no inquiry or challenge of the integrity of the transaction for nearly five years. Such indifference and inattention must be adjudged *laches*."

152 U. S. 560-561.

In *Foster v. Mansfield etc. R. R. Co.*, 146 U. S. 88 (1892), the court said:

"The foreclosure of this road could not have taken place without actual as well as legal knowledge of the fact by its stockholders, and if they believed they had any valuable interest to protect, it was their duty to have informed themselves by an inspection of the records of the court in which the foreclosure was carried on, of what was being done, and to have taken steps to protect themselves, if they had reason to believe their rights were being sacrificed by the directors."

146 U. S. 99.

In *Bower v. Stein*, 177 Fed. 673 (C. C. A., 9th Cir., 1910), the complainant filed a bill in the circuit court of the United States for the district of Oregon to invalidate a judicial decree rendered in the state court "and to go behind that decree to the extent of obtaining leave to redeem the property which was sold thereunder" (p. 676). The defendant demurred. From a decree dismissing the bill, complainant appealed. The decree was affirmed. The court said in part:

"The suit to foreclose the mortgage was begun on April 30, 1898. The decree was rendered on September 9, 1898, and the sale was made on the

18th day of the following October. The present suit was begun on June 6, 1907. The bill alleges that the appellant had no knowledge of the foreclosure suit 'until after said decree was rendered,' and that she had no 'actual' notice of the sale of said property on foreclosure until 'subsequent to June, 1902.' Construing these allegations as they must be construed, most strongly against the pleader, we have to infer that the appellant knew of the foreclosure suit immediately after October, 1898, and that on July 1, 1902, she had actual notice of the sale. The date when such actual notice was received is not important, for knowledge of the foreclosure suit imparted notice to her that a sale would follow in due course. It is a well-established principle of equity practice that diligence must be exercised in asserting the right to set aside a decree in cases of this nature. Unnecessary delay is deemed a waiver of the right. It is no excuse for such delay that the plaintiff is without means or resides in a distant state.

* * * * *

"The appellant herein had notice of the foreclosure suit as early as October,, 1898. The records were public, and at all times accessible to her. Everything which she now complains of was discoverable upon examination thereof. She could then have ascertained all of the facts in regard to the sale in ample time to have redeemed therefrom. The possession of the means of knowledge was equivalent to knowledge itself. Having had the opportunity of knowing, she cannot now avail herself of her failure to acquire actual knowledge of the facts."

Before passing to the next point, it remains briefly to distinguish the cases cited by appellants under their caption "Complainants not guilty of *laches*."

The first case cited is the case of *Pickens et al. v. Campbell et al.*, 159 Pac. 21 (1916); a decision of the Supreme Court of Kansas on litigation growing out of the subject-matter upon which this suit is grounded. The Kansas court held that in the case before it the plaintiffs' complaint stated a cause of action. Reference is made to the memorandum opinion of the lower court in the case at bar, and it is expressly conceded that a different rule of pleading with reference to discovery prevails in the Kansas than in the Federal courts. (159 Pac. at 23, 24.)

In *O'Brien v. Wheelock*, 184 U. S. 450 (1902), the bill was dismissed because of *laches*. The suit was to charge land owners with liability for the amount of levee assessments under an unconstitutional statute. A decree in a former suit permitted the owner of certain bonds by supplemental or original bill to bring in the land owners. He took no steps to do so during his lifetime, which continued for about six years after the decree, and the bill was brought by his executors about nine years after such decree, during which time the owners of the property assessed were constantly changing, and they had spent large sums for repair of the levee and had also been liable for very large assessments under a new statute.

Galliher v. Cadwell, 145 U. S. 368 (1892), is one of a line of Federal cases holding that when property

has increased in value during the interval of time which has elapsed, the plaintiff's action is barred. In that case Tacoma had increased in population from 1098 to 36,006 in ten years. The court said:

“Of course such a rapid increase during this decade implies an equally rapid and enormous increase in the value of property so situated as to be an addition to the city.” (P. 371.)

Other cases holding this doctrine will be found collected in Pom. Eq. Remedies, vol. 1, sec. 23, note 67.

In Bacon v. Bacon, 150 Cal. 477 (1907), a period of only three years elapsed between the decree in probate and the suit to set it aside. The bill was predicated on mistake consisting of the reading of a legacy as \$2,000.00 instead of \$10,000.00. The court said:

“We do not find anything in the evidence which would necessarily put her [the plaintiff] on inquiry as to the amount of the legacy, or cause her to suspect that there had been a mistake concerning it.” (P. 493.)

Soule v. Bacon, 150 Cal. 495, arose on substantially the same facts as Bacon v. Bacon, *supra*.

In Cahill v. Superior Court, 145 Cal. 42 (1904), the proceeding was in mandamus to compel the superior court to hear and consider a motion to modify and in part vacate a previous order of the court setting apart a homestead. The order of the superior court refusing to consider the motion was made on April 10, 1903, but was not entered until after May 6, 1903; within sixty days from the entry petitioners attempted

to appeal therefrom to the supreme court. On December 7, 1903, the widow moved to dismiss the appeal on the ground that the order was not appealable. On March 28, 1904, the appeal was dismissed; and application for rehearing was made and denied, and on April 28, 1904, the remittitur was issued; the present application for a writ of mandate was filed five days thereafter. The court held that prejudice could not be presumed from the lapse of time. (See p. 48.)

Appellants argue that at the time of the alleged frauds there was a fiduciary relation existing between themselves and Jeanette Fensky and Campbell. *Bacon v. Bacon*, *supra*, and *Robins v. Hope*, 57 Cal. 497 (1881), are cited. *Bacon v. Bacon* has to do with husband and wife, and in *Robins v. Hope* it was held that the parties were dealing at arm's length. It must be quite obvious that when appellants negotiated with Mrs. Fensky and Campbell for the sale of the former's interest in the estate of Ferdinand Fensky, the parties stood at arm's length.

Appellants also cite *Prevost v. Gratz*, 6 Wheaton 481 (1821); *McIntire v. Pryor*, 173 U. S. 38 (1899); and *Meader v. Norton*, 11 Wallace 442. The last case cited seems entirely beside the point.

In *Prevost v. Gratz*, *supra*, the bill was dismissed because of *laches*. Mr. Justice Story, who delivered the opinion, said that concealment of fraud was an aggravation of the offense; he added, however,

“That length of time necessarily obscures all human evidence; and as it thus removes from the

parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption in favor of innocence, and against imputation of fraud." (P. 498.)

In McIntire v. Pryor, *supra*, it was held that under the circumstances of that case the lapse of nine years did not constitute *laches*. The court pointed out:

"That the plaintiff is an ignorant colored woman; that she has been wheedled out of her property by an audacious fraud committed by one in whom she placed entire confidence, and who assumed to act as her agent; that this agent procured the title to the property to be taken in his own interest, for little more than a nominal sum, by the false personation of Emma Taylor; that the property is still controlled and probably owned by himself; that the position of the property and of the parties to the suit has not materially changed during the time the plaintiff has been in default, nor the property shown to have rapidly risen in value, and that the rights of no *bona fide* purchaser have intervened."

173 U. S. 53-54.

III.

The Alleged Fraud was Intrinsic.

The question involved in appellees' third point is whether the acts of fraud alleged in the bill of complaint are intrinsic or extrinsic to the various orders and decrees of the probate courts upon which attack is made by the complaint. If they constitute extrinsic fraud the plaintiffs have the right, so far as this par-

ticular point is concerned, to have their allegations investigated; on the other hand, if they constitute intrinsic fraud, no such right exists and the motion to dismiss was properly granted. It may be postulated that, a proceeding in probate being *in rem*, the final decrees in the three probate proceedings referred to were binding upon the whole world (unless impeachable for extrinsic fraud).

Case of Broderick's Will, 21 Wall. 503 (1874);
State v. McGlynn, 20 Cal. 233 (1862).

Let us inquire as to the distinction between extrinsic and intrinsic fraud.

In the leading case of United States v. Throckmorton, 98 U. S. 61, 65 (1878), Mr. Justice Miller said:

“There are no maxims of the law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely: *Interest reipublicae, ut sin finis litium*, and *Nemo debet bis vexari pro una et eadem causa*. * * *

“But there is an admitted exception to this general rule, in cases where, by reason of some thing done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in

ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. * * *

“On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed.”

98 U. S. 65-66.

The learned judge referred to the case of *Green v. Green*, 2 Gray. 361 (1854), as containing “perhaps the best discussion on the whole subject,” and quoted the following from the opinion of Shaw, C. J.:

“The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been either actually tried, or *so in issue that it might have been tried*, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be controverted.” (Italics are ours.)

In the case of *Pico v. Cohn*, 91 Cal. 129 (1891), a leading case not only in California, but generally, it was said by Beatty, C. J.:

“That a former judgment or decree may be set aside, and annulled for some frauds there can be no question; but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy, that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is, that there must be an end of litigation; and when parties have once submitted a matter, *or have had the opportunity of submitting it*, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client’s interest. (*United States v. Throckmorton*, 98 U. S. 65, 66, and authorities cited.)

“In all such instances, the unsuccessful party is really prevented, by the fraudulent contrivance of

his adversary, from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that, necessarily, the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear."

91 Cal. 134.

An analysis of the allegations of the complaint in the case at bar will show that plaintiffs are in fact relying upon a claim that the orders of the probate courts were made as a result of false and perjured testimony. While it was claimed that there was actual and wilful concealment of material facts from the plaintiffs themselves, it appears that the alleged fraud upon which the probate court is said to have acted consisted of false returns made to that court in the course of the probate proceedings, and in perjured testimony given in support thereof, and not fraud in preventing appellants from presenting their case. In returning her inventory in the probate of her husband's estate in California, Jeanette Fensky necessarily swore that she had returned *all* of the property of the estate of which she had knowledge; and the court necessarily so determined. Plaintiffs now complain that this is not the fact, but the truth is that she concealed from them and from the court the existence of certain property which in fact belonged

to the estate, and her accounts and inventory were fraudulent and inaccurate. These accounts were all matters of record in the probate proceedings necessarily proved by her testimony, and were settled and allowed upon the strength of that testimony. Similar observation might be made regarding the other probate proceedings.

It was alleged that Jeanette Fensky failed to inventory and return to the court, as assets of the estate of Ferdinand Fensky, a large amount of property which in fact belonged to that estate. The question then is, did the appellants have an opportunity to expose the frauds complained of in the various probate proceedings? Appellants were parties to those proceedings actually or constructively; and they had actual knowledge of their pendency and progress. [Tr. 27.] Can it seriously be urged that appellants did not have a right to present to the courts of probate as a material part of the pending proceedings the facts now presented to this court? Can it be questioned that if such matters had been presented by appellants, and found favorably to them, the decrees in probate would have been different? Does not the answer to these questions necessarily involve the further answer that the frauds complained of were intrinsic and not extrinsic?

On this branch of the case, the learned trial judge said in part:

“Nothing is herein set forth which shows that the complainants were in any wise prevented from appearing in court and protecting their rights, or

from making any investigation as to the true condition of affairs. * * *

“Assuming that the unverified bill states the exact facts of the case, nevertheless there is nothing therein from which it can be even inferred that complainants were at all prevented from making the investigations which would have resulted in a disclosure of all of their rights. * * *

“The amount, character and value of the estate belonging to the intestate, however, were determined by the court, and were by it solemnly distributed, as according to the law, to defendant’s predecessor in interest.” [Trans. 52-53.]

There are a number of well considered cases in California in which the court was called to pass upon situations not dissimilar to that presented by the bill of complaint.

In *Pico v. Cohn*, 91 Cal. 129 (1891), the action was to set aside a judgment secured by reason of the perjured testimony of a witness who had been suborned by defendant’s intestate. The action was to have a deed absolute on its face declared a mortgage. The case on its facts was a hard one. The court said:

“It is averred, and we think sufficiently shown, that upon proof of these facts there is a reasonable certainty that plaintiff would, upon another trial, gain his cause. Such being the case, is plaintiff entitled to a decree vacating and annulling the former decree on the ground that it was procured by fraud?”

91 Cal. 133.

After expounding the law in the language quoted in an earlier portion of this brief, the court proceeded:

“But counsel for appellant seek to distinguish this case from those in which it has been held that a judgment will not be set aside by reason of its being based upon forged documents or perjured testimony. They say that the fraud committed by Cohn was the bribing of Johnson; that this was collateral and extrinsic; that it was not and could not have been the subject of investigation at the trial of the original action. We do not think that this distinction can be maintained. The fraud which Cohn committed was the production of perjured evidence in support of his defense. The means by which he induced the witness to swear falsely was but an incident. * * *

“It is a matter of indifference what particular form such corrupt practice takes. The evil and the wrong is in the perjury which follows. In this case the truth of Johnson’s evidence was necessarily drawn in question at the trial, and determined by the decision of the court; and all that has since been discovered is another item of testimony bearing on that point.”

91 Cal. 134-135.

In *Langdon v. Blackburn*, 109 Cal. 19 (1895) (cited with approval in *Stead v. Curtis*, 191 Fed. 529, 534 (C. C. A., 9th Cir., 1911)) it was urged that certain property in the hands of the defendant, a brother of the decedent, and his wife, was held by them in trust for plaintiff’s intestate, who was a sister of the decedent. It was alleged that the will of the decedent, under which defendants claimed, was a forgery, and

that as the result of a conspiracy plaintiff's intestate had been informed by her son, who was a party to the conspiracy with the defendant, that her entire interest in the estate of her deceased brother amounted to \$3,000.00 only; that she had accepted this amount without further questioning, and that

“ ‘But for said false statement, her reliance thereon, and the payment of said money to her, she, the said Maria Kirshner, would have had her suspicions aroused; would have made inquiries in the premises; have discovered that said purported will was a forgery, and would have opposed the probate thereof.’ ”

109 Cal. 23.

The court held that these facts did not constitute extrinsic fraud. After reviewing certain of the authorities, the court said:

“ ‘Mrs. Kirshner must have known of the death of her brother and that she was one of his heirs, and presumably must have known that he left a large estate.

“The law required that when a petition for the probate of a will is filed, and the will produced, the time for the hearing must be fixed, and the notice of the hearing published in a newspaper for a certain length of time (Code Civ. Proc., sec. 1303), and that copies of the notice of the time appointed for the probate of the will must be sent by mail to the heirs of the testator residing in this state. (Code Civ. Proc., sec. 1304.)

“It must be presumed, therefore, there being no allegation to the contrary, that a proper notice of the application to probate the will in controversy

was published and sent out as required by law, and that Mrs. Kirshner received the notice sent to her. And being thus notified it became her duty, within a year at least after its probate, to make inquiry as to the validity and contents of the will.

* * *

“It will be observed that it is not alleged in the complaint that young Findley said anything to his mother about the will or its terms, or the probate thereof, or that he advised or even suggested that it was unnecessary for her to be present at the hearing, or to employ counsel to represent her thereat, or to make any inquiries about the will or the estate. He simply told her that her interest in the estate was only three thousand dollars, and, the money being afterward paid, she quietly rested on that assurance until after the time to institute a contest had elapsed. (Code Civ. Proc., sec. 1327.)

“This did not, in our opinion, constitute such an extrinsic or collateral fraud as will enable the representative of her estate to now claim the relief asked for.”

109 Cal. 27-28.

In *Del Campo v. Camarillo*, 154 Cal. 647, 662, it was held that fraudulent concealment, at time of presenting a will for probate, of an attempted revocation of the will, and a fraudulent preservation of the document, constituted intrinsic and not extrinsic fraud, the court saying:

“It is the established law of this state, as well as of many other jurisdictions, that an order admitting a will to probate, duly made by the court

of probate jurisdiction, in a proceeding for that purpose, cannot be vacated by a court of equity for direct fraud in establishing it, consisting either of perjured testimony or a false will, produced before the court at the time of the hearing, and further, that a devisee therein cannot be declared a trustee in favor of the heir in a suit in equity by the heir based on such fraud. The fraud here complained of consisted of producing this will to the court, introducing evidence establishing its due execution, and in avoiding a disclosure of the alleged attempted revocation and fraudulent preservation thereof. All these were facts relating to the validity of the will, which was the very fact to be then determined by the court. This character of fraud comes within the same class as perjured testimony or the fraudulent production and proof of a false will previously forged."

154 Cal. 662.

In addition to the cases reviewed above see:

U. S. v. Throckmorton, 98 U. S. 61, 65, 67 (1878);

Stead v. Curtis, 205 Fed. 439, 442 (1913);

Stead v. Curtis, 191 Fed. 529, 533-536 (1911);

Fealey v. Fealey, 104 Cal. 354 (1894).

Appellants suggest that Langdon v. Blackburn, *supra*, is distinguishable because "to grant the relief prayed for it would be necessary for the court of equity to review the action of the probate court and set aside its decree admitting the will to probate." (Their brief,

p. 47.) In the case referred to the prayer was "that defendants be adjudged to hold one-fourth part of the property of the estate so received by them in trust for the estate of Maria Kirshner for an accounting." (109 Cal., at page 24.) It is submitted that the suggested distinction is unfounded in fact. It is moreover without merit, because the rule regarding extrinsic fraud is equally applicable when a court of equity is asked to declare defendants trustees of plaintiff.

Craigie v. Roberts, 6 Cal. App. 309 (1907);

Del Campo v. Camarillo, 154 Cal. 647 (1908).

Appellants cite in support of their contention that the alleged fraud is extrinsic the following cases:

Lataillade v. Orena, 91 Cal. 565 (1891);

Wingerter v. Wingerter, 71 Cal. 105 (1886);

Carter v. Shell, 129 Cal. 208 (1900);

Wickersham v. Comerford, 96 Cal. 433 (1892);

Marshall v. Holmes, 141 U. S. 589 (1891).

In most of the above cases the distinction between extrinsic and intrinsic fraud was neither noticed nor discussed. That is true in the following, viz.:

Wingerter v. Wingerter, *supra*;

Lataillade v. Orena, *supra*;

Wickersham v. Comerford, *supra*;

Griffith v. Gody, *supra*;

Marshall v. Holmes, *supra*.

In Curtis v. Shell, *supra*, which was a bill in equity to set aside an order granting a family allowance on the suit of a creditor, it was said:

“In this case the respondent was entirely helpless as against the proceedings in the probate court initiated and carried on by the appellant. The proceeding to set aside family allowance is *ex parte*. In fact, an order for such purpose can be entered by the court of its own motion. The complaint charges and the court finds the suppression of a material fact, which matter thus suppressed and withheld was a fraud, not only against the respondent, but also a fraud committed upon the court. The fraud, however, was extrinsic and collateral to the question examined on the application for the family allowance.”

129 Cal. 215-216.

In distinguishing *Wickersham v. Comerford*, *supra*, it was said in *Fealey v. Fealey*, 104 Cal. 354 (1894), at page 361:

“In the original proceeding for a homestead under review in that case the court did not even *indirectly* pass upon the question of the existence or nonexistence of the agreement for separation, and that matter not being before the court, was not concluded by the judgment or order in that proceeding; but, as we have seen, the direct question sought to be litigated here, viz., whether the land set apart to defendant as a homestead was or was not community property, was put in issue in the homestead proceeding, resulting in the order here assailed; and the court, upon the evidence submitted to it at the time of making that order, found the fact adversely to the plaintiff's present contention, and this marks the important distinc-

tion between the present and the case of Wicker-sham v. Comerford, 96 Cal. 433.”

104 Cal. 361.

It has not escaped judicial animadversion that general charges of fraud are easily made; and such charges are treated as declamation rather than as allegations of fact. Especially is this true after death has called some of the material witnesses and lapse of time has dimmed the memory of others. One charging fraud is, therefore, required affirmatively to show diligence before he can move the chancellor, and if there has been failure to discover the fraud alleged for a long time, the failure must be accounted for and the manner of discovery disclosed. The present complaint is conspicuously wanting in these regards. In 1903 the plaintiffs sold their interest in the estate of their brother to his widow. Almost eleven years afterwards they brought this action to set aside the transaction on the ground that an inadequate consideration was accepted because of the fraudulent misrepresentations of the widow. Meanwhile, the widow had died and three probate proceedings had gone to final judgment. What explanation do the plaintiffs seek to give for their long delay? Only their bare assertion that they were in ignorance of the frauds until accidentally discovered in 1912. But, the complaint is entirely wanting in averment that plaintiffs made any inquiry or investigation during the long lapse of time. It does not appear but that the most cursory examination

would have disclosed the real situation. Moreover, plaintiffs disclose only the manner in which they made partial discovery, and are silent as to the rest; and they charge only such fraud as they had ample opportunity to expose to the courts of probate.

It is respectfully submitted that the judgment of the court below is correct and should be affirmed with costs to appellees.

WM. J. HUNSAKER,
E. W. BRITT,
LEROY M. EDWARDS,
JOSEPH L. LEWINSOHN,
J. H. MERRIAM.

Solicitors for Appellees.

No. 2783.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louisa Pickens and Johanna
Schutt,

Appellants.

vs.

J. H. Merriam, Eugene Wellke,
Alma J. Schmidt, Amanda
Katzung, Minnie S. Farns-
worth, Corrine Loveland and
Don Ferguson,

Appellees.

Filed

JUN 20 1907

F. D. Monckton,
Clerk

PETITION FOR REHEARING.

WM. J. HUNSAKER,
E. W. BRITT,
LEROY M. EDWARDS,
JOSEPH L. LEWINSOHN,
J. H. MERRIAM,
Attorneys for Said Appellees.

No. 2783.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louisa Pickens and Johanna
Schutt,

Appellants.

vs.

J. H. Merriam, Eugene Wellke,
Alma J. Schmidt, Amanda
Katzung, Minnie S. Farns-
worth, Corrine Loveland and
Don Ferguson,

Appellees.

PETITION FOR REHEARING.

Duty to our clients requires us to point out (with respect and deference but with candor) that in the learned opinion announced in the case at bar, the court has inadvertently fallen into grave error. This, we respectfully urge, results primarily from the omission to notice three propositions of law advanced in appellees' brief, the application of any one of which to the

facts would have constrained to the affirmance of the decree. These propositions are:

First: Plaintiffs who charge fraud after the running of the statutory period must, in their complaint, affirmatively show diligence on their part, and this is true whether or not the fraud has been concealed; and their duty in this regard is not discharged by an allegation of ignorance at one time and knowledge at another, but they must fully disclose the facts showing when discovery was made, how it was made, what the discovery was, and why it was not sooner made. (Wood v. Carpenter, 101 U. S. 135; Hardt v. Heidweyer, 152 U. S. 547; Kelley v. Boettcher, 85 Fed. 55, 62.)

The failure of the court to apply these principles arises from the misapprehension that the decision of the Kansas court is "persuasive" here, when in truth and in fact the rules of pleading in Kansas are diametrically opposed to the rules in the federal courts and in California. (See *infra*.)

The reasons for the practice in the federal courts, which follows immemorial usage in courts of equity, are obvious, and are succinctly stated in Foster v. Mansfield, Cold Water & Lake Michigan Railroad Co., 146 U. S. 88, where it is said:

"The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that

he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts.”

146 U. S. 99.

Secondly: Where there has been a lapse of time several times the duration of the statutory period, together with the death of a party or an important witness, laches is shown. (Foster v. Mansfield etc. Co., 146 U. S. 88, at p. 100; Hinchman v. Kelley, 54 Fed. 63, at p. 66 (C. C. A., 9th Cir.); Socrates etc. Mines v. Carr Realty Co., 130 Fed. 293, at 297 (C. C. A., 9th Cir.)).

Thirdly: Not only the matter actually tried in a proceeding, but also matter “so in issue that it might have been tried” is intrinsic to a judgment. (U. S. v. Throckmorton, 98 U. S. 61, citing with approval Greene v. Greene, 2 Gray, 361.)

It will conduce to a better understanding of these points here to suggest some phases of the facts alleged in the complaint which are, it seems to us, important, but which apparently have not so impressed the learned writer of the opinion.

First, let it be noted that the court is in error in saying plaintiffs are seeking an accounting from defendant Merriam, administrator of the estate of Jeanette Fensky, “for so much of the estate as has come into his hands *and for which no account has been rendered.*” (Opinion, page 17.) To the contrary, the prayer is only that he be required to account to the complainants for the distributive shares of the estate of

the said Jeanette Fensky, which *came into his hands* and which *was by him distributed* to the said Wellke, Katzung and Schmidt. [Transcript p. 29.]

It is truly said in the opinion that the cause of action in the Kansas case is identical (in most respects) with the cause of action in this case, "except that the former relates to the estate in Kansas and the latter to the estate in California." The alleged fraudulent acts of Jeanette Fensky and Campbell, the Kansas administrator of the Ferdinand Fensky estate, necessarily constituted a part of plaintiffs' statement of their cause of action so far as it relates to the cancelling of their deeds to Jeanette Fensky, but this suit relates solely to the California property, the property which came to the hands of defendant Merriam as administrator of the estate of Jeanette Fensky and was distributed in the probate proceedings in that estate, and the California real property described in several deeds made by Jeanette Fensky to defendants Alma J. Schmidt, Eugene Wellke, Amanda Katzung and Corrine Loveland, which deeds, it is charged, were not delivered during the lifetime of Jeanette Fensky. It is directly alleged, however, that the deeds were signed and acknowledged by Jeanette Fensky several months before her death and "*were recorded a few days after her death.*" [Trans. p. 27.] As Jeanette Fensky died July 8, 1908 [*Id.* p. 21], these conveyances were matters of public record for nearly six years prior to the commencement of this suit.

While it is stated that plaintiffs did not, until the early part of 1913, have any notice or knowledge that

the deeds were not delivered during the lifetime of Jeanette Fensky, there is no allegation as to when, or how, or from whom, the complainants then obtained such information; nor as to what they did learn with respect to the non-delivery of the deeds, other than the bald allegation that neither of the plaintiffs had notice or knowledge thereof until the early part of 1913. And it will be noted that this discovery, if it may be so termed, was made more than a year before the complaint was filed; also that the information obtained from the correspondence between Campbell and Jeanette Fensky was acquired late in the summer of 1912; and, further, that it was not acquired by the exercise of diligence by the plaintiffs, but that one of the daughters of plaintiff Pickens *accidentally* secured access to the correspondence between Campbell and Jeanette Fensky, which disclosed to said daughter “a part of the truth” (what part or how much is not stated) relative to the estate of Ferdinand Fensky and the dealings of Campbell and Jeanette Fensky in reference thereto. [Trans. p. 27.] Further, it appears that the discovery made from the correspondence between Campbell and Jeanette Fensky had nothing to do with the California property, which consisted of the property described in the aforesaid deeds signed and acknowledged by Jeanette Fensky and recorded “a few days after her death,” and the money and notes distributed to certain of the defendants.

There is not a syllable in the complaint tending to show that complainants were not thoroughly familiar with the business affairs of Ferdinand Fensky during his lifetime and up to the time of his death. There is

an utter absence of averment to the effect that either Mrs. Fensky or Campbell resorted to any trick or artifice to prevent complainants from interviewing the debtors of the estate or the contractual vendees of the real estate. Indeed, as iterated and reiterated in appellees' brief, there is absolutely nothing in the complaint remotely to suggest the slightest exercise of diligence on the part of the complainants during the eleven years that elapsed since the time of the alleged frauds.

The death of parties or of important witnesses is universally recognized as an important factor in determining whether a cause of action is barred by laches. Here it is shown by the allegations of the complaint that Jeanette Fensky has been dead many years, and her estate administered and distributed. And it affirmatively appears from the report of *Pickens v. Campbell*, 159 Pac. 21, cited by this court in its opinion, that prior to the date of that decision Campbell had died and the action had been revived in the name of his administrator. (159 Pac. 22.) So the lips of both actors in the alleged fraud have long been closed by death.

I.

Failure of the court to take into account the difference between the principles of equity pleading in the federal courts and the rules of pleading in the Kansas courts has led it into the error of declaring that the decision of the Kansas court in the suit brought by the present plaintiffs is "persuasive as to the rules applicable to the same questions as they relate to the estate in California." (Opinion, pp.

11-12.) This gives an effect to the Kansas decision not claimed by its authors, and is admittedly at variance with the rule of pleading generally recognized and uniformly prevailing in the federal courts. In the Kansas case the court said:

“The contention is made that the petition is demurrable because it merely alleges that the plaintiffs did not know of the facts pleaded until July, 1912, and does not state how the discovery came about. *The general rule appears to be that such a statement is required.* 25 Cyc. 1418; Hardt v. Heidweyer, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548. *But the contrary practice obtains in some of the states, including Kansas.* K. P. Rly. Co. v. McCormick, 20 Kan. 107; 25 Cyc. 1419.” (159 Pac. 24.)

This point is made in appellees' brief (p. 29), but is not referred to in the opinion. It should be borne in mind, and has doubtless escaped the attention of the court, that the rule in the courts of California in this regard is the same as in the courts of the United States. In Phelps v. Grady, 168 Cal. 73 (relied upon in appellees' brief), speaking to this very question, and on facts much like those alleged in the complaint here, after observing that the complaint in intervention there sufficiently charged acts of deceit, the court said:

“But in this case the conveyance was executed in 1904. The decree of final distribution in the estate of Timothy Guy Phelps was given in 1907. This action was commenced in 1912, and here for the first time interveners are found asserting the right to avoid their conveyance because of its

fraudulent procurement. Excepting upon a proper showing touching their discovery of the fraud their cause of action was barred. One seeking relief under such circumstances is held to stringent rules of pleading. Says the supreme court of the United States in *Wood v. Carpenter*, 101 U. S. 135:

“In this class of cases the plaintiff is held to stringent rules of pleading and evidence. Especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether by reasonable diligence the discovery might not have been before made. * * * If the plaintiff made any particular discovery it should be stated when it was made, what it was, how it was made and why it was not made sooner.

* * * * *

“Concealment which will avoid the statute must go beyond mere silence. It must be something done to prevent discovery. * * * Concealment must be the result of positive acts. Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.’

“And this is the rule consistently adopted and adhered to in this state.” (Citing four California cases.) (168 Cal. 77-78.)

Another evidence of the omission of this court to apply the principle that plaintiffs must affirmatively show diligence, by the averment of facts and circum-

stances, is found in the fact that the opinion assumes that *Wood v. Carpenter*, 101 U. S. 131, relied upon by respondents, is inconsistent with *Bailey v. Glover*, 21 Wall. 342, and is in effect overruled by *Rosenthal v. Walker*, 111 U. S. 185, and *Traer v. Clews*, 115 U. S. 528,—the last two cases following *Bailey v. Glover*. But in truth there is no inconsistency between the *Wood* case and the *Bailey* case, and the former case is expressly approved after the fullest consideration in the subsequent case of *Hardt v. Heidweyer*, 152 U. S. 547, relied upon in appellees' brief, but not noticed in the opinion of this court. Moreover, the doctrine of the *Wood* case and of the case last cited has been uniformly accepted as an authoritative statement of the law by the federal courts. (*Hubbard v. Manhattan etc. Co.*, 87 Fed. 51, C. C. A., 2nd Cir.; *Thornton et ux. v. Mayor etc.*, 129 Fed. 84, C. C. A., 5th Cir.; *Kelly v. Boettcher*, 85 Fed. 55, 62 C. C. A. 8th Cir.)

Let it be observed that in *Bailey v. Glover*,—the chief cornerstone of the opinion here,—the court in clear and explicit language recognizes the principles we invoke. Following the portion of the opinion quoted by this court, Mr. Justice Miller said:

“We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it *without any fault or want of diligence or care on his part*, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.” (21 Wall. 348.)

Wood v. Carpenter but holds in accordance with the immemorial usage in courts of equity that such diligence must affirmatively appear from plaintiff's complaint.

It would appear that some confusion has been caused by Rosenthal v. Walker, *supra*, and Traer v. Clews, *supra*, but that confusion was dissipated in the able opinion of Mr. Justice Brewer in the subsequent case of Hardt v. Heidweyer, *supra*. And in neither of the earlier cases was the question now under discussion involved or considered. All of these cases were bankruptcy cases, and in each of them the proceeding was to reach property alleged to have been fraudulently concealed by the bankrupt.

In Rosenthal v. Walker the question considered by the court was whether concealed fraud would toll the statute. The court did not deal with the question of diligence nor with the manner of pleading discovery. Without any detailed examination of Wood v. Carpenter, the court said that case did not overrule or modify Bailey v. Glover, and also referred to the fact that it was an action at law without noticing that the legal rule has been borrowed from equity jurisprudence. (See 111 U. S., pp. 190-191.) Moreover, the case stood before the court after verdict. The same is true of Traer v. Clews. In this case also the sufficiency of the allegations in the complaint were not before the court and the court did not consider the doctrine of Wood v. Carpenter with reference to that point. Indeed, in that case, as in Bailey v. Glover, the allegations in the bill do not appear from the report.

But in *Hardt v. Heidweyer*, 152 U. S. 547, this precise question was considered. The circuit court had sustained a demurrer to the bill and dismissed the same. The appeal was from this decree of dismissal. The court, after an elaborate review of the authorities, approved *Wood v. Carpenter*, and quoted the following from the latter case:

“ ‘A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner.’ ” (152 U. S. 559-60.)

The court also quoted with approval the following from an opinion by Mr. Justice Story in a case on the circuit:

“ ‘General allegations, that there has been fraud, or mistake, or concealment, or misrepresentations, are too loose for purposes of this sort. The charges must be reasonable, definite, and certain as to time, and occasion, and subject-matter. And especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, *and what the discovery is*; so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made. For if, by such diligence, the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches. * * * But the bill does not state *what particular discoveries* have been obtained, or when they were obtained, or

by what inquiries, or in what manner, or at what time.' " (152 U. S. 559.)

In the Hardt case the court did not cite the earlier cases of Bailey v. Glover, Rosenthal v. Walker and Traer v. Clews, although the authorities were reviewed at length. Apparently the court did not feel called upon to cite those cases for the obvious reason that they were not in point. In the instant opinion, commenting upon Traer v. Clews, *supra*, this court says:

"It was objected that there was neither pleading nor proof to avoid the bar under the rule stated in Wood v. Carpenter. The court held that under the ruling in Bailey v. Glover, which had never been overruled, doubted or modified by the court, the pleadings and evidence were sufficient, and the suit was not barred by the statute of limitations." (Opinion, p. 15.)

It is respectfully submitted that this language is inconsistent with Hardt v. Heidweyer, and it is believed that a consideration of that case will convince the court that it has fallen into error.

The omission of the court to apply the rule requiring the plaintiff affirmatively to show what diligence he has exercised is shown yet again by the fact that the court quotes from 19 Am. & Eng. Ency. 243, to the effect that the statute is tolled by such fraudulent concealment as prevents plaintiff from instituting suit. Assuming that the fraud here alleged comes within that rule, the following, quoted from the article referred to, shows that the matter quoted by the court is inapplicable here:

“This exception to the ordinary operation of the statute of limitations is *subject to the qualification that the party complaining must have used due diligence in endeavoring to discover the fraud or concealment practiced upon him and the facts which the defendant’s fraud concealed.*” (19 Am. & Eng. Ency. of Law, p. 250.)

The same qualification is contained in the article in Cyclopedia of Law and Procedure cited by the court. See 25 Cyc., p. 1216.

As to any title acquired either as grantees of Jeanette Fensky or as distributees of her estate, appellees were involuntary trustees of a trust cast upon them by operation of law; no fiduciary relation was created or subsisted between them and appellants, and the statute of limitations for the enforcement of such implied trusts commenced to run upon the acceptance of their conveyances and the entry of the decree of distribution; and it was not necessary, in order to set the statute in motion, that appellees should have attacked or repudiated such trust.

Nougues v. Newlands, 118 Cal. 102.

In Robertson v. Burrell, 110 Cal. 568, the court, speaking to this question of pleading, said:

“Moreover, after the lapse of so much time, and *after the death of all the original parties, equity, for the peace of society, scrutinizes with great particularity bills such as this, and is not satisfied to retain one unless the fullest possible credible showing is made by the applicants for relief.* (Citing, among other cases, Wood v. Car-

penter, 101 U. S. 135, 143.) * * * The facts and circumstances must themselves be pleaded in order that the court may determine whether the sources of knowledge at last availed of were not at all times open to plaintiffs, whether they were negligently overlooked, whether other circumstances should not earlier have put plaintiffs upon discovery, what was the nature of the concealment practiced, whether it consisted in mere silence, or was accompanied by active misrepresentation and fraudulent deception.”

110 Cal. 577-578.

After observing that in the instant bill there was not an entire absence of averment in these respects, but that it was a “fleshless skeleton of allegation,” the court proceeded to say:

*“What the statements were; how long before his death they were made; whether or not due diligence after their making would not have resulted in discovery during Burrell’s lifetime; * * * what were the inquiries which the heir made and which resulted in discovery; of whom were they made, and why were they not made years before, are all questions which, upon the demand of the demurrer, should be answered by the bill in order that the chancellor, to whose conscience, in the first instance, the equity of the bill is addressed, should satisfy himself that plaintiffs have not neglected or slept upon their rights. (Hardt v. Heidweyer, 152 U. S. 547.)”*

110 Cal. 578.

So, it would seem to be beyond question that the bill here is fatally defective, and that the district court

was right in dismissing the bill on the grounds that it was barred by *laches* and the statutes of limitation.

II.

The opinion makes bare mention of the fact that appellees contended in their brief that under the circumstances of this case prejudice to them should be presumed from the lapse of time together with the death of an important witness. (Opinion, page 17.) It is alleged in the bill that Jeanette Fensky died July 8, 1908, six years before the filing of the bill, and about five years after the perpetration of the alleged fraud by her and Campbell, and it appears from the report of *Pickens v. Campbell*, 159 Pac. 21, as already pointed out above, that Campbell is also deceased. If the present case were to go to trial the court would be obliged to get the facts regarding the alleged fraud from the appellants alone. It has been frequently emphasized by the courts that, after the great lapse of time and the death of important witnesses, it is easy for plaintiffs to charge fraud and almost impossible for defendants to meet the charges. Considering that every presumption is in favor of fair dealing, we submit, it must be obvious that appellees would be seriously prejudiced in undertaking to refute the present charges by reason of the death of Jeanette Fensky and of Campbell.

This point is ruled by the following authorities cited in appellees' brief at page 21, and not mentioned in the opinion.

Hinchman v. Kelley, 54 Fed. 63, at p. 66 (1893)
(C. C. A., 9th Cir.);

Foster v. Mansfield Co., 146 U. S. 88, at p. 100
1892);

Socrates etc. Mines v. Carr Realty Co., 130 Fed.
293, at p. 297 (C. C. A., 9th Cir., 1904).

A peculiarly apt case is Hinchman v. Kelley, *supra*, decided by this court (McKenna, Circuit Justice, and Hawley and Morrow, District Judges). There the bill was dismissed on demurrer, and the judgment of dismissal affirmed by this court. The case is succinctly stated in the syllabus:

“An assignee of one claiming to be *cestui que trust* of the vendee named in an executory contract to convey land brought suit to establish a trust in such land 19 years after the vendor's death, and 6 years after the death of the vendee, the alleged trustee,—a period exceeding the statutory period of limitation. There was no written evidence of the trust. It did not appear that its enforcement had been requested in the lifetime of either party to the contract, or that the trust was ever admitted by the vendee's executors, and no explanation of the delay was made. Held, that there was such laches as would justify a court of equity in refusing its aid.”

54 Fed. 63.

The following from the opinion, together with a quotation from Story's Eq. Juris., appearing on page 66 of the report, are directly in point:

“One of the particular reasons which have induced the courts to refuse to act is the difficulty of ascertaining the necessary facts to make it safe for a court of equity to exercise its judicial power, and this is especially so in a case like the one

under consideration, when the means of resisting the trust, if unfounded, cannot be obtained on account of the death of the parties. In all cases where the complaining party has slumbered over his rights for a long period of time, with no obstacle in the way to prevent him from asserting them, until the evidence upon which such rights might be questioned and overthrown is lost, and all the original actors are dead, and their affairs left to heirs or representatives, it is deemed meet and proper that the law, in the exercise of its equitable jurisdiction, should presume it to be unjust, and refuse to allow the complainant to be heard. The peace and safety of society and the property rights of the general public demand this protection. *Prevost v. Gratz*, 6 Wheat. 498; *McKnight v. Taylor*, 1 How. 168; *Jenkins v. Pye*, 12 Pet. 241. A failure to exercise reasonable diligence to enforce the trust, or the omission to specifically state the impediments to an earlier prosecution of the claim or demand, is another special reason for the application of the general rule. *Badger v. Badger*, 2 Wall. 87; *Sullivan v. Railroad Co.*, 94 U. S. 811; *Godden v. Kimmell*, 99 U. S. 211; *Lansdale v. Smith*, 106 U. S. 394, 1 Sup. Ct. Rep. 350."

54 Fed. 65-66.

In *Foster v. Mansfield etc. R. R. Co.*, *supra*, the court also affirmed a judgment dismissing the bill on demurrer. The bill was to set aside a foreclosure sale of a railroad under a mortgage, on the ground of fraud and collusion, but was not filed until ten years after the sale. In holding that the delay was not sufficiently explained, the United States supreme court

calls especial attention to the death of important witnesses (see page 100). Portions of the opinion might have been written for present purposes.

“If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights; but if he is aware of his interest, and knows that proceedings are pending the result of which may be prejudicial to such interests, he is bound to look into such proceedings so far as to see that no action is taken to his detriment. * * * The slightest effort on his part would have apprised him of the proceedings subsequent to the sale; * * * Had he asked the leave of the court to intervene for the protection of his interest, it would have undoubtedly acceded to his request. Instead of this, he permits the sale to take place, and the road to pass into the hands of a new corporation, which has operated it for ten years without objection from the bondholders or creditors of the Coldwater Company, and without question as to its title. In the meantime many of the witnesses, including both Cass and Scott, trustees, whose alleged fraudulent betrayal of their trust constitutes the gravamen of this bill, are dead, as well as Lewis, the president, and Fish and F. V. Smith, directors of the defendant company, one of whom participated with Lewis in the meeting at which the attorneys were instructed to withdraw their defense, and all opportunity of explanation from them is lost. It is evident that the plaintiff in this suit has fallen far short of that degree of diligence which, under the most recent decisions of this court, the law exacts in condonation of this long delay.” (Citing cases.)

The point is also made in the brief that laches is shown where there has been a marked increase in the value of property, which in turn will be presumed from an increase in population together with lapse of time.

Gallihier v. Cadwell, 145 U. S. 368.

Referring to this point the court says:

“It may appear to be a too strict adherence to the rules of procedure to hesitate to entertain the last named presumption, but we think such matters are matters of defense and should be established by proof upon the hearing of the case.” (Opinion, p. 17.)

It is submitted that the error here consists in the failure to observe that courts take judicial notice of the United States census. An enormous increase in population in San Pedro and Los Angeles during the time elapsing between the alleged fraud and the filing of the bill must therefore be presumed. This presumption being established, it follows from the case cited that an increase in value must also be presumed, there being no averments in the bill to negative the same.

III.

It is clear on principle and authority that the exception to the rule which makes a judgment final and unassailable is concerned not with false allegations in pleadings, or fraud or perjury in the presentation of evidence, but is confined to fraud *in the conduct of the suit*,—such fraud as prevents parties from pre-

senting their case. The rule is so stated in *United States v. Throckmorton*, 98 U. S. 61, 65, and in *Pico v. Cohn*, 91 Cal. 129, 134. (See appellees' brief, pp. 34-37.) After giving instances of the application of the rule, Beatty, C. J., said:

"In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial."

Pico v. Cohn, supra.

In a passage from the opinion of Chief Justice Shaw in *Greene v. Greene*, 2 Gray 361, quoted by Mr. Justice Miller in *United States v. Throckmorton, supra*, it is said:

"But where the same matter has been either actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be controverted."

2 Gray 366.

The bill is entirely wanting in averments that either Jeanette Fensky or Campbell, or any of the appellees, resorted to any trick, or artifice, or device, to prevent the complainants from appearing in the probate proceedings; and it affirmatively appears from the allegations of the bill that they had notice and watched the progress of the proceedings [Tr. p. 27]. It is not alleged, moreover, that any notices required by law were not given; nor is there any allegation that any representations of any sort were made to appellants to induce them to refrain from appearing in the probate proceedings. All there is to this case in this

respect is that evidence was concealed showing that Jeanette Fensky's deeds had not been delivered, that unfounded representations were made to the court that the brother and sisters of Jeanette Fensky were entitled to succeed to her estate, when in truth the brother and sisters of Ferdinand Fensky were entitled to such succession. In other words, all supposed fraudulent acts on the part of appellees, or any of them, from the death of Jeanette Fensky to the present, as disclosed by the bill, consisted merely of matters which were intrinsic, and related to the very questions which were adjudicated in the probate proceedings.

It has been truthfully said of the statutory provisions governing the probate of estates in California that "It is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth." (Case of Broderick's Will, 21 Wall. 503, 517.) And it is established by numerous decisions of the supreme court of California that:

"The distribution of the estate of a deceased person is a proceeding *in rem*, and every person who may assert any right or interest therein is required to present his claim to the court for its distribution, and the action of the court in making the determination binds the whole world, and is equally conclusive upon every claimant, whether his claim is presented, or whether he fails to appear, subject only to be reversed, set aside, or modified upon appeal, and its decree can not be

collaterally attacked for any error committed therein.”

William Hill Co. v. Lawler, 116 Cal. 359;

Crew v. Pratt, 119 Cal. 139, 149.

The subject-matter upon which the court was called to act in the settlement of the final account of the administrator and distribution of the estate of Jeanette Fensky was (she having died intestate) who was entitled to distribution thereof; and the probate court was required to determine this question and to “name the persons and the portions or parts to which each shall be entitled.”

C. C. P., sec. 1666;

Crew v. Pratt, 119 Cal. 139, 151.

This was the question in issue and determined. False statements and false representations to the court as to who was entitled to so succeed, and false evidence or concealment of evidence were, let it be reiterated, intrinsic, and not extrinsic, to the matters determined. Fraud, if fraud it was, was fraud practiced on the court, and not on the appellees. It is so well settled as scarcely to require the further citation of authority that unfounded allegations in pleadings or petitions, and the presentation of forged instruments or perjured testimony are *intrinsic*, and not *extrinsic* frauds. In *United States v. Throckmorton*, after reviewing many cases, the court succinctly stated the rule thus:

“In all these cases, and many others which have been examined, relief has been granted on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or

decree, that party has been prevented from presenting all of his case to the court.”

98 U. S. 66.

Speaking of other cases the court further said:

“We think these decisions establish the doctrine on which we decide the present case, namely: that the acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, *extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.*”

98 U. S. 68.

Applying these principles the court concluded:

“The genuineness and validity of the concession from Micheltorena produced by complainant was the single question pending before the board of commissioners and the district court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document.”

98 U. S. 69.

Pico v. Cohn, 91 Cal. 129, holds directly that a judgment cannot be vacated on the ground that it was obtained by perjured testimony.

The California supreme court has held that a complaint in an action to annul an order setting apart a homestead to the widow of a deceased person out of his estate, which *alleged* that the property set apart was the *separate* property of the deceased, and that the widow, defendant in the action, *knowing* that fact, *and for the purpose of deceiving the court, falsely alleged* and *falsely swore* that the property was the *community* property, whereby the court was misled and deceived, and induced to make the order, did not state facts sufficient to constitute a cause of action. (Fealey v. Fealey, 104 Cal. 354.) The opinion was written by the late Judge DeHaven, who said:

“The case made by the complaint here falls exactly within the rule declared in United States v. Throckmorton, 98 U. S. 61; Griffith’s Estate, 84 Cal. 113, and Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159.”

104 Cal. 359.

And, speaking of United States v. Throckmorton and Pico v. Cohn, the learned justice continued:

“These case are, we think, conclusive of the one now before us. So far as concerns the question here presented, there is no difference in principle in the nature of the judgments under review in the above-cited cases and the order here sought to be annulled. The order setting apart the homestead to defendant (no homestead having been declared during the lifetime of the deceased) op-

erated to vest in the defendant a title to the land so set apart. (Estate of Boland, 43 Cal. 640; Estate of Moore, 96 Cal. 522); and such order was in the nature of a judgment *in rem* (Kearney v. Kearney, 72 Cal. 591); and the court, having jurisdiction to pronounce it, it is conclusive upon plaintiff and all persons interested in the estate, and can only be successfully attacked in equity upon the same grounds upon which a judgment *in personam* may be annulled."

104 Cal. 360.

See, also,

Miller v. Perris Irr. Dist., 85 Fed. 693, 701.

It is submitted that the court again was led to an erroneous conclusion by relying on the decision of the supreme court of Kansas in *Pickens v. Campbell*; and, particularly, in failing to note (a) that the attack was there held to be a direct attack on the order settling Campbell's account, and (b) that the principal ground of attack there was that the settlement of Campbell's accounts was procured by the use of releases of these complainants of all demands against the Ferdinand Fensky estate which had been obtained by intentionally false statements, particularly by the representation that the Kansas real estate had not been sold by Fensky, in which case the entire title would, of course, have vested in his widow upon his death. The court expressly said that a fraud so accomplished was to be regarded as extrinsic to the issue determined by the probate court, and, therefore, capable of forming a basis for setting aside its order. (159 Pac. 22.) And that this is the basis for the ruling of the court is manifest. Re-

ferring to the opinion of the district judge in this case the Kansas court said: "The allegations in the two cases may not have been precisely the same. Here it would appear that the use of the releases, together with the receipt of the widow and domiciliary administratrix, made it unnecessary to make any decision concerning the disposal of the assets with which the ancillary administrator was chargeable." (159 Pac. 23.)

But there is no pretense that the deeds and releases executed by the complainants were used, or had anything to do with, the distribution of the estate of Jeanette Fensky; and the holding of the Kansas supreme court, therefore, is not persuasive here.

A re-reading of the opinion in *Griffith v. Godey*, 113 U. S. 89, will, we are confident, convince the court that it is inapplicable to any question involved in this case. In that case the defendants were held as trustees as to the proceeds arising from the sale of the property which Godey, as administrator of the estate of the brother and surviving partner of complainant, had appropriated, and which property and its proceeds he had fraudulently omitted from the administration proceedings. No question of intrinsic or extrinsic fraud which would avoid a judgment or order settling an account was considered or passed on. In *Lataillade v. Orena*, 91 Cal. 565, there was also a fiduciary relation and a resulting trust, and the question of extrinsic fraud was not considered, as it was not involved.

Wherefore, for the reasons here urged, appellees Eugene Wellke, Alma J. Schmidt, Amanda Katzung, Minnie S. Farnsworth, and Corrine Loveland respect-

fully pray that the decision of this court reversing the judgment of the district court be set aside and they be granted a rehearing.

WM. J. HUNSAKER,
E. W. BRITT,
LEROY M. EDWARDS,
JOSEPH L. LEWINSOHN,
J. H. MERRIAM,
Attorneys for Said Appellees.

The undersigned, counsel for said appellees, hereby certify that in their judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

WM. J. HUNSAKER,
E. W. BRITT,
JOSEPH L. LEWINSOHN,
Of Counsel for Petitioners.

No. 2783.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louisa Pickens and Johanna
Schutt,

Appellants.

vs.

J. H. Merriam, Eugene Wellke,
Alma J. Schmidt, Amanda
Katzung, Minnie S. Farns-
worth, Corrine Loveland and
Don Ferguson,

Appellees.

Filed

JUN 20 1917

F. D. Monckton,
Clerk.

PETITION OF APPELLEE MERRIAM FOR REHEARING.

WM. J. HUNSAKER,
E. W. BRITT,
LEROY M. EDWARDS,
JOSEPH L. LEWINSOHN,
Attorneys for Said Appellee.

No. 2783.

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Louisa Pickens and Johanna
Schutt,

Appellants.

vs.

J. H. Merriam, Eugene Wellke,
Alma J. Schmidt, Amanda
Katzung, Minnie S. Farns-
worth, Corrine Loveland and
Don Ferguson,

Appellees.

PETITION OF APPELLEE MERRIAM FOR REHEARING.

Supplementing the petition of his codefendants, appellee Merriam (herein, for brevity, designated "petitioner"), to the end that the court may have before it the points which differentiate his case from that of the other appellees, respectfully prays the court to grant him a rehearing, for the reasons therein and herein stated. This may appropriately be done, as petitioner made a separate motion for the dismissal of the cause

as to him [tr. pp. 40-43], based on grounds additional to those raised in the motions of the other defendants, among them, that he was improperly joined as a party defendant, and that the bill was wholly without equity as to him.

Both the complaint and the decision of this court seem to assume that there was an obligation on the part of the administrator of Jeanette Fensky's estate to trace back to its original source the money by which any property belonging to the deceased person was purchased, and that property formerly owned by her, and shown by the record of the very deeds given by these complainants themselves to have been obtained by purchase, was not in fact obtained by purchase, but by descent; also that it was the duty of the administrator to know that persons who were not related by blood to the decedent were her sole heirs, when those very persons, having full knowledge of the pendency of the proceedings, were not themselves claiming to be sole heirs or heirs at all. Also that it was his duty to know that the property of said deceased husband was in fact separate property, and not community property, contrary to the showing of the record which complainants had themselves permitted to stand all those years. In fact, the effect of the decision is such that any administrator would, at his peril, administer upon the estate of a deceased, unless he was gifted with omniscience.

It is important, at the outset, to attract the attention of the court to the fact that it is erroneously stated in the opinion (p. 17) that "the relief sought is * * * an accounting by the defendant Merriam, the adminis-

trator of the estate of Jeanette Fensky, for *so much of the estate as has come into his hands and for which no account has been rendered.*" An examination of the bill will show that the only relief prayed against petitioner is that he "be required to account to these complainants for their distributive shares of the estate of the said Jeanette Fensky, which came into his hands and which was *by him distributed* to the said Wellke, Katzung and Schmidt" [tr. p. 29]. It is not alleged in the bill that by any act of petitioner (or, for that matter, of Wellke, Katzung or Schmidt), complainants were prevented from either knowing the facts upon which they could have established any claim which they might have in the estate of Jeanette Fensky, or in any manner preventing them from acquiring knowledge of such facts, or setting up their claims regarding any other question adjudicated by the decree of distribution. Nor is it alleged that petitioner, at the time of the institution of this suit, had any right or power to act as administrator of the estate of Jeanette Fensky, or that he then had, or now has, any property belonging to said estate, or that any property of the estate came into his hands as administrator which he has not administered and distributed under the authority of the probate court. It is not stated that petitioner had anything to do with the administration of the estate of Ferdinand Fensky, either in California or in Kansas, or with procuring the deeds from the complainants to Jeanette Fensky, or that he represented any of the parties in interest in any of said transactions, or that he participated in or knew about any of the alleged frauds claimed to have been perpetrated by Jeanette

Fensky and Campbell. All that is alleged in this respect is that he knew that the deeds from Jeanette Fensky to the other appellees had not been delivered and that he omitted to include in his inventory other property belonging to her estate, and that he knew the persons to whom the property was distributed were not entitled to it.

What the bill further charges and fails to charge, so far as it concerns petitioner, may be summarized as follows:

August 7, 1903, Ferdinand Fensky died, leaving an estate consisting of real and personal property, some in Kansas and some in California; July 29, 1904, and August 3, 1904, complainants, respectively, executed and delivered to Jeanette Fensky their quitclaim deeds conveying to her all their interest in the estate of Ferdinand Fensky [tr. p. 17]; March 30, 1905, Jeanett Fensky filed her final account which was approved and she was forthwith discharged [tr. p. 18]. September 18, 1907, Jeanette Fensky signed and acknowledged several deeds to certain of the defendants (other than Merriam) conveying property situate in California, which had been distributed to her in the proceedings had for administration of the estate of her deceased husband. July 8, 1908, Jeanette Fensky died, and "a few days after her death" the deeds were recorded, "but were made and acknowledged several months before she died" [tr. p. 27]; August 1, 1908, petitioner was appointed administrator of Jeanette Fensky's estate [tr. p. 22]; the petition for his appointment was made by defendants Eugene Wellke, Amanda

Katzung and Alma J. Schmidt, whom petitioner represented [tr. p. 22]; September 8, 1909, petitioner filed his inventory and final account and distributed the property to certain of the defendants [tr. pp. 23 and 25]; that said final account falsely set forth that said Eugene Wellke, Amanda Katzung and Alma J. Schmidt were the sole heirs at law of said Jeanette Fensky [tr. p. 23]; that “complainants * * * pending the proceedings in the superior court of Los Angeles county, California, involving the administration of the estate * * * of the said Jeanette Fensky, *paid attention to said proceedings, and from time to time secured copies of papers that were filed therein*” [tr. p. 27].

It is not alleged that the complainants (who had actual knowledge of said proceedings) *made any claim that they were the heirs of Jeanette Fensky*; nor is it alleged that any facts were brought to the attention of petitioner, or known by him, upon which such heirship could be predicated, nor from which he could infer that the property constituting her estate was not her separate property, nor that any part of it, nor what part, if any, had come to her from the estate of her deceased husband; nor what the character of it might have been at the time of the death of such husband.

Even if it had been alleged that facts were brought home to the administrator sufficient to charge him with knowledge of the alleged invalidity of the deeds of complainants, he certainly had no right and no power, as such, to set aside or ignore such deeds, especially in the absence of any claim being made on their behalf therefor. And if the administrator did not, and, in

the nature of things, could not, have any knowledge that the complainants were the heirs of Jeanette Fensky, there was no duty imposed upon him to disclose to strangers claiming no interest in the estate, and who were not shown by the record to have any interest therein, the fact that certain deeds executed by the deceased to the heirs of the estate were not, in fact, delivered before her death, even if he knew that to be the fact.

The facts alleged in the bill disclose no cause of action against petitioner. No accounting is sought from him except for property which he has distributed. And, it would seem not to require argument or citation of authority that as to property distributed he could not be compelled to account.

In considering the questions under discussion, it should be borne in mind that there was no fiduciary relation existing between petitioner and complainants, or between them and Jeanette Fensky and Campbell. (Appellee's brief p. 32.) This position is well supported by *Herron v. Herron*, 71 Ia. 428, 32 N. W. 407. There the plaintiff urged that the defendant's possession as administrator created a fiduciary relation between the parties; but the court held otherwise, saying:

“Clearly, this position is not tenable. Defendant did not occupy a position of trust or special confidence towards plaintiff. She did not deal with his attorney in her capacity as administratrix of the estate. On the death of John Herron, the real estate of which he was seized descended in equal shares to plaintiff and defendant. Her interest in the property was a personal interest. In her representative capacity she had no interest

whatever. It was a case of tenants in common dealing with each other with reference to the common estate. Neither of the parties was charged with the duty of protecting the rights or guarding the interest of the other in the property. They stood upon an equality, and clearly there can be no presumption of unfairness or fraud in the transaction.” (Pages 407-8.)

See also:

In re Pearsons, 98 Cal. 603;

Elliott v. Higgins, 83 N. Car. 459-462;

Barker v. Barker, 14 Wis. 142.

Here, if the deeds signed and acknowledged by Jeanette Fensky were not delivered, no title passed by them to the grantees, and, upon her death, the title vested immediately in those who were entitled to succeed to her estate, subject to the control of the probate court and *to the possession of any administrator appointed by that court for the purpose of administration.* (Civil Code, Sec. 1384; *Brenham v. Story*, 39 Cal. 179.) No *title* vested in petitioner, as administrator.

If, as alleged in the bill, the accounts of petitioner as administrator of the estate of Jeanette Fensky were allowed, and a decree of distribution was entered, the order allowing the account and making distribution are final and conclusive.

“The settlement of the account and the allowance thereof by the court, * * * is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account, or

to proceed by action against the executor or administrator, either individually or upon his bond, *at any time before final distribution*; and in any action brought by any such person, the allowance and settlement of the account is *prima facie* evidence of its correctness."

Cal. C. C. P., Sec. 1637.

That such decree is conclusive on all parties interested has been repeatedly declared by the supreme court of California.

Tobelman v. Hildebrandt, 72 Cal. 313, 316;

Washington v. Black, 83 Cal. 290;

Reynolds v. Brumagim, 54 Cal. 254.

If it should be suggested, contrary to the theory of the bill, that a decree of distribution has not been entered in the estate of Jeanette Fensky, the complainants have an adequate remedy by applying to the probate court to compel the administrator to include any omitted property in his inventory, and, upon his refusal to do so, to have him removed.

Cal. C. C. P., Secs. 1451, 1436;

Estate of Bell, 135 Cal. 194;

Estate of Newell, 18 Cal. App. 258;

Estate of Bauquier, 88 Cal. 302;

Mesmer v. Jenkins, 61 Cal. 151.

"Whenever property not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of

such inventory may be enforced, after notice, by attachment *or removal from office.*”

Cal. C. C. P., Sec. 1451.

“Whenever a judge of the superior court has reason to believe from his own knowledge, or from credible information, that any executor or administrator * * * has committed or is about to commit a fraud upon the estate, * * * he must, by an order entered upon the minutes of the court, direct such executor or administrator to be cited to appear and show cause why his letters should not be revoked, and may also suspend the powers of such executor or administrator, until the matter is investigated.”

Cal. C. C. P., Sec. 1436.

Upon the death of Jeanette Fensky those who were entitled to the property under the provisions of section 1386 of the Civil Code of California (whether complainants or the persons to whom the same was distributed) became immediately vested with the full title to the property, subject only to the right of administration; and no title at any time was vested in petitioner as administrator.

Cal. Civil Code, Sec. 1384;

Brenham v. Story, 39 Cal. 179.

If, as is the only fair inference from the allegations of the bill taken on demurrer, the administration of the estate of Jeanette Fensky was closed prior to the filing of the bill, the complainants have a plain remedy in the ordinary course of law by applying to the probate court to open the proceedings and have an adminis-

trator appointed to administer the newly discovered property, or to have the newly appointed administrator of the estate bring actions to recover any property belonging to the estate.

“The final settlement of an estate, * * * shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate be discovered, or if it becomes necessary or proper for any cause that letters should be again issued.”

Cal. C. C. P., Sec. 1698.

In such case the jurisdiction of the court over the estate continues as to subsequently discovered property of the deceased.

Sheils v. Nathan, 12 Cal. App. 604.

Again, the heirs of Jeanette Fensky are expressly authorized by the statutes of California to maintain and prosecute any actions necessary for the recovery of any property of which she died possessed.

“The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against anyone except the executor or administrator; but this section shall not be so construed as requiring them so to do.”

Cal. C. C. P., Sec. 1452.

Wherefore, for the reasons here and in the petition of his codefendants urged (all of which petitioner adopts and asks to be considered as a part of this peti-

tion) petitioner respectfully prays that the decision of this court reversing the judgment of the district court be set aside and petitioner granted a rehearing.

WM. J. HUNSAKER,

E. W. BRITT,

LEROY M. EDWARDS,

JOSEPH L. LEWINSOHN,

Attorneys for Said Appellee.

The undersigned, counsel for petitioner, hereby certify that in their judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

WM. J. HUNSAKER,

E. W. BRITT,

JOSEPH L. LEWINSOHN,

Of Counsel for Petitioner.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NORTH AMERICAN OIL CONSOL-
IDATED, a corporation, WALTER
P. FRICK, JOHN F. CARLSTON,
CLARENCE J. BERRY, DENNIS
SEARLES, WALTER H. LEI-
MERT and WICKHAM HAVENS,

Appellants,

vs.

THE UNITED STATES OF
AMERICA,

Appellee.

No. 2789

BRIEF IN BEHALF OF APPELLANTS.

A. L. WEIL,
U. T. CLOTFELTER,
CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Appellants.

CHARLES S. WHEELER,
Of Counsel.

Filed this.....day of October, 1916.
FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk

The James H. Barry Co.,
San Francisco

Filed

OCT 10 1916

F. D. Monckton,
Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

NORTH AMERICAN OIL CONSOL- IDATED, a corporation, WALTER P. FRICK, JOHN F. CARLSTON, CLARENCE J. BERRY, DENNIS SEARLES, WALTER H. LEI- MERT and WICKHAM HAVENS, <i>Appellants,</i>	} No. 2789
vs.	
THE UNITED STATES OF AMERICA, <i>Appellee.</i>	

BRIEF IN BEHALF OF APPELLANTS.

This is an appeal from an order appointing a Receiver. The facts are undisputed. The affidavits filed by the government not only do not contradict appellants' showing, but in material particulars they support and corroborate it. Appellants insist that it follows as a conclusion of law from the uncontradicted facts that they have a right to possess and extract oil from the land in controversy.

The ultimate facts in the showing before the Court constitute substantially the proofs that will be made upon the trial of the case. The determination of the questions of law involved upon this appeal will therefore amount practically to a disposition of the case upon its merits.

There are ten producing wells upon the said property. More than nine hundred thousand dollars is shown to have been expended by appellants in the development and improvements thereon. In addition to this outlay it also appears that the appellant corporation has paid on account of the purchase price of this property an amount in excess of half a million dollars (Tr., pp. 78-80).

THE QUESTION OF LAW INVOLVED.

The Government does not assert that the locations under which appellants claim were made by "dummy" locators.

The complaint proceeds upon the theory that these lands were withdrawn from entry by President Taft's withdrawal order of September 27, 1909, and that appellants have no rights which are preserved by the Act of June 25, 1910, known as the Pickett Bill.

The position of appellants is that their rights were unaffected by the said withdrawal order; they insist that the locations under which they claim were "valid and existing" at the date of said order and were there-

fore excluded from its general provisions by the following words thereof:

"All locations or claims existing and valid on this date may proceed to entry in the usual manner after filing, investigation and examination."

Appellants do not claim that any discovery of oil had been made on any part of said land at the date of said withdrawal order. The President's language does not require (and we insist that it was not intended to mean) that a location or claim to be "valid and existing" must have been already perfected by a discovery of oil or gas.

It is furthermore appellants' contention that if it be the meaning of said withdrawal order that all claims unperfected by discovery are thereby destroyed, the facts here are such that they nevertheless bring these locations within the protection of the following proviso of the Act of June 25, 1910, commonly known as the Pickett Bill:

"Provided, that the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work."

In the following pages the two propositions upon which appellants thus rely will be discussed in their order:

I.

THE RIGHTS OF APPELLANTS AS MEASURED BY THE
TAFT WITHDRAWAL ORDER.

SYLLABUS OF THE DISCUSSION ON THIS POINT.

At the date of the Taft withdrawal order—September 27, 1909—neither of the four locations in controversy had been perfected by discovery of oil. But the Pioneer Midway Oil Company, the grantee of the original locators, was on said date in actual physical possession of the said four claims. It had already erected upon each of them the very derrick with which a well was subsequently drilled; it had purchased and hauled to the site of the derricks two boilers for use in drilling for oil; it had sunk a hole to a considerable depth in a search for the water necessary for drilling for oil; it had erected cabins suitable for housing the drilling crews; and on the date that said order was made it had a crew of men at work upon the several claims preparing the ground for the installation of drilling plants and had expended several thousand dollars in the course of these various activities.

Appellants insist: (1) That upon the foregoing facts a Court, if called upon on said 27th day of September, 1909, would have been legally bound to protect the possession of said Pioneer Midway Oil Company against any form of hostile entry or intrusion, even if the purpose of such entry had been to effect a location of said lands under the permissive provisions of the mineral laws of the United States.

(2) That any location or claim which the courts would thus have recognized and protected on said date was a valid and existing claim or location within the meaning of President Taft's words. A location or claim of a character so substantial that the courts would thus recognize and protect it could not properly be said to be either without existence or validity. That the President did not intend to strike down such claims.

(3) As thus interpreted, the order is consistent, just, and conscionable. An interpretation which would narrowly confine the phrase to such claims only as had been perfected by discovery at said date would at once do violence to the accepted usage of the language employed by the President and would render the order grossly inequitable, while at the same time it would deprive the words employed of any force and effect not already implied; for no one has ever supposed—and no lawyer of President Taft's recognized learning and ability would ever suppose—that the vested rights of the owner of a mining location perfected by discovery could be taken away from him either by an act of Congress or by a Presidential order.

Appellants and their predecessors, pursuant to the permission expressly extended to them in the said withdrawal order, proceeded in good faith to perfect and did perfect their said claims. Discoveries of oil were made thereon several years prior to the filing of plaintiff's bill. Vast sums had been expended in their exploration and development when this suit was brought. Upon the uncontradicted showing, these properties have never been affected by the said withdrawal order. The rights of appellants are vested rights and the Government having shown no right, legal or equitable, to disturb appellants' possession, it was error to appoint a Receiver.

It is essential at the outset of our discussion to determine the correct meaning and intent of the phrase "all locations or claims existing and valid at this date" which President Taft employed in his withdrawal order of September 27, 1909. Said order is worded as follows:

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public do-

main, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after filing, investigation and examination."

Are the words "all locations or claims existing and valid at this date" to be confined solely to locations or claims which at said date had already been perfected by discovery?

Or does this phrase embrace all locations or claims not then perfected by discovery, but which nevertheless had been initiated by location notices and which were attended on said date by the actual physical possession of the land claimed, accompanied by diligent effort and outlay looking to a discovery of oil thereon?

That the phrase was intended to exclude and does exclude from the omnibus withdrawal, locations or claims of the latter class we respectfully insist is entirely clear. While such locations or claims could not properly be said to be perfected until an actual discovery, they nevertheless were recognized as having an existence and validity which entitled the diligent locator in actual possession to protection against all manner of hostile intrusions. They were claims of a substantial character. The extent to which they were treated as valid and existing locations or claims is illustrated by the following quotations:

As long ago as 1881 Justice Miller said in *Crossman v. Pendery*, 8 Fed. Rep., 693, 694:

"The plaintiffs might have protected their actual possession of their entire claim by proper legal proceeding prior to the discovery of mineral by the defendants, or by either party.

"A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral."

In *Rooney v. Barnette*, 200 Fed. Rep., 700, 710, the United States Circuit Court of Appeals for this Circuit said:

"It is objected to this location that Hastings, the original locator, made no discovery on the claim, and without a discovery Hastings had nothing to convey to Stafford, and that Stafford had, therefore, no right of possession. This objection cannot be sustained, either upon the fact or the law. . . .

"As to the law: The location of mineral ground gives to the locator before discovery, and while he complies with the statutes of the United States and the state and local rules and regulations, the valuable right of possession against all intruders, and this right he can convey to another."

In a recent California case the District Court of Appeals of the Second Appellate District said:

"The argument of the plaintiff that the title of the defendant under mining location merely, without discovery of minerals, was totally invalid and of no effect, is true only in a qualified sense. This title by such location and possession was good as against every person contending against it, except the paramount power, to wit: the government of the United States. Had the plaintiff, being vested with whatever right the defendant held as to the land, gone upon it and proceeded to prosecute work with the view to making a discovery of oil, his possession could

not have been disturbed by strangers. . . . It cannot be said that the rights which the defendant purported to clothe the plaintiff with were of no value at all."

Hullinger v. Big Sespe Oil Co., 28 Cal. App., 69, 73.

In a leading California case it is said:

"One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession."

Miller v. Chrisman, 140 Cal., 440, 447.

No one will doubt that in proper usage the terms "location" and "claim" embrace within their meaning claims which have not been perfected by discovery, as well as those which have. A glance at the foregoing quotations shows this. Similarly, this Court has said (*italics ours*):

"Appellees could not at that time have acquired any title to the lands included in their *locations*. The discovery of mineral was essential for that purpose, but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. They were in occupancy of the land they had *located*. They claimed it to be mineral and were diligently at work to prove it to be such."

Cosmos, etc. Co. v. Gray Eagle Oil Co., 112 Fed. Rep., 4, 14.

If it is sought to confine the words "location or claim" to such only as have been perfected by discov-

ery, the restrictive adjective "perfected" or its equivalent is properly used, as witness the following:

"There is some force in the suggestion that the act relates only to *perfected claims*. That is, to those upon which a discovery has already been made. . . . If a discovery had previously been made upon the unoccupied contiguous *claim* . . . there might be a discovery sufficient to perfect the *location*."

Smith v. Union Oil Co., 166 Cal., 217, 224.

It is beyond debate, therefore, that, according to the accepted usage of the language, a location or claim may "exist" without a discovery. It is equally clear from the foregoing authorities that prior to discovery, such a claim, if attended with possession and proper diligence, may, without straining the English language, be called a "*valid*" location or claim. Such a location does not, of course, give to the claimant a vested right in the land as against the Government, The Government acting through either the President or Congress has the power to withdraw such land from entry at any time prior to discovery, however harsh or tyrannical the arbitrary exercise of such a power might be. But there is an obvious distinction between a location or claim which is valid and existing so far as the rights of private individuals are concerned, though not binding upon the Government, and a *perfected* location or claim which the Government cannot take away from the unwilling citizen short of the exercise of the power of eminent domain.

OUR INTERPRETATION SANCTIONED BY JUDICIAL
DECISION.

No appellate tribunal, so far as we are aware, has heretofore been called upon to place an interpretation upon the language used by President Taft. The question arose directly, however, upon the application for the appointment of a receiver in an important case in the Southern District of California. Judge Bledsoe rendered a carefully considered opinion wherein he gave to President Taft's phraseology an interpretation squarely in accord with our contention. Judge Bledsoe said:

"Special pains were taken to indicate that the intention of the executive was that only '*valid*' locations or claims were to be excepted from the general operation of the withdrawal order. In order to ascertain the extent of this exception it is necessary to define what, under the law, and within the meaning and true intent of the Presidential action, constitutes a '*valid*' location or claim."

After reviewing the authorities and pointing out that prior to discovery the locator has no vested right as against the Government, the learned Judge says:

"Having, however, initiated his claim, by the posting of his notices, he is protected as against third persons, as long as he 'remains in possession and with due diligence prosecutes his claim toward a discovery.' As long as he thus conducts himself, though as against the government he has no vested rights, nevertheless, he has rights which ought to be by all parties respected.

"And, in this spirit, all locators who were thus conducting themselves at the time of the making of the withdrawal order, had their rights respected by the President by the exception contained therein, and hereinabove referred to. That is to say, on the date that the withdrawal order was made, if any locator was then on withdrawn lands, in

possession, and was 'with due diligence' prosecuting his work toward a 'discovery of oil,' by the express provisions of the withdrawal order, it did not affect him. He had a 'valid' location, and he could, despite the general terms of the order, 'proceed to entry in the usual manner,' that is, proceed to a discovery and thereby perfect his right to the mineral claim. If, however, at the date of the withdrawal order such locator was not in possession, or was not with 'due diligence' prosecuting his work toward a discovery, then he had no 'valid' location, and in virtue of the efficacy of the withdrawal order as an act of a duly authorized agent of the United States government in that behalf, the order served to withdraw from further entry, location, settlement, or other disposal, the land so claimed by such locator. . . . If discoveries of oil were made subsequent to the withdrawal order in virtue of claims initiated, however, prior thereto, and if at the time of the making of such order the locators or their successors were in occupation of the property claimed, and were at that time diligently engaged in the prosecution of the work looking to a discovery of oil therein they would be protected in their rights by the express terms of the withdrawal order itself."

U. S. v. McCutcheon, et al., Equity Suit A-12.

(The foregoing excerpts from the opinion of Judge Bledsoe will be found set forth in his opinion, which is copied substantially in full as an appendix to the brief filed by the Government in this Court in Appeals No. 2660, entitled "*El Dora Oil Company, et al. v. United States of America.*")

**UNLESS SO INTERPRETED PRESIDENT'S WORDS EFFECT
NO USEFUL PURPOSE.**

We have seen that Judge Bledsoe's interpretation of the President's language is in accord with the accepted usage of the President's words. Another very persuasive reason for this interpretation is that unless the words in question are held to include claims or locations valid and existing as between rival claimants,

but unperfected by discovery, the President's phraseology has no necessary place in his order of withdrawal. No Chief Executive, much less a lawyer of President Taft's recognized learning and ability, would suppose that such an order could interfere with or divest the vested rights of the owner of a perfected claim. The claimant whose location was perfected needed no words of protection; he was already amply protected by the Federal Constitution.

"As said in *Belk v. Meagher*, 104 U. S., 279, 283: 'A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent.' It is not, therefore, subject to the disposal of the government."

Sullivan v. Iron Silver Mining Co., 143 U. S., 431, 434.

"When a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession."

152 U. S., 505, 511.

It would therefore have been a mere idle and useless formality for the President to have expressly excepted perfected claims in his order. But the same cannot be said of the very large class of locations and claims whose owners had prior to said date, in good faith, and with the consent of the Government, entered into actual possession, and who had upon the faith of the Government's promises of title, expended much labor and money in a diligent effort to accomplish a

discovery of oil. The unhappy plight of locators so situated, if the President failed to protect their claims, is evidenced by the following quotation (*italics ours*):

“But it is always to be borne in mind that until the perfection of the inchoate location by discovery, the locator has no vested rights which Congress is obliged to recognize. So that Congress may change its policy in regard to the lands to the extent even of excluding therefrom the diligent operator who has not made discovery. **However inequitable such a proceeding might be**, it in no way would be illegal.”

Miller v. Chrisman, 140 Cal., 447.

What Congress might do in the way of withdrawing lands from entry the President also could lawfully do—as we now know from the decision of the United States Supreme Court in the *Midwest Case*. That President Taft did not wish or intend to treat such locators and claimants in a manner which a court could properly characterize as “inequitable” we conceive not to be open to doubt or debate. In view, therefore, of the fact that there was every moral reason to insert such a clause for the benefit of persons holding with due diligence claims then unperfected by discovery, and no legal occasion appearing for expressly saving the vested rights of the owners of perfected claims, it is proper to conclude that the *primary* purpose of the President in inserting his words of exception was to protect claimants of the former class.

THE INTERPRETATION INSISTED UPON IS OBVIOUSLY
JUST.

But perhaps the most potent and convincing argument of all in favor of the interpretation which we are contending for rests not so much in the niceties of language and law already pointed out, as upon the inherent equity and justice attending such a construction. At the very least, it must be conceded that the President's order is susceptible of the more generous interpretation. And since it renders the order just and equitable it should obviously be given the preference over an interpretation which would convict the government of the United States of harsh and unconscionable conduct toward a very considerable number of its citizens and subjects.

A distinguished judge of this Honorable Court has said:

"No good reason can be offered why the United States in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. . . . When matter of estoppel arises, the observance of honest dealings may become of higher importance than the preservation of the public domain. It was well said in *Woodruff v. Trapuall*, 10 How., 190, that we naturally look to the actions of a sovereign state to be characterized by more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals."

U. S. v. Land Wagonroad Co., 54 Fed., 807,
811-12 (per Gilbert, J.).

The foregoing principles should be in mind, we submit, when the President's order is up for interpretation. The situation existing in the oil fields of California on the day that this particular order of withdrawal was made is matter of common knowledge. On that date, both within and without the boundaries of the lands affected by the withdrawal, many millions of dollars had been expended in good faith in diligent efforts to perfect locations by a discovery of oil. In some districts within the United States, and even in California, nature had been sufficiently gracious to place her oil deposits but a few feet below the surface. In the very valuable Midwest Oil Field of Wyoming, for instance, discoveries were made and claims perfected by sinking with relatively inexpensive appliances to a depth of but fifty feet. There the necessary machinery could be installed and a discovery successfully and easily made within the period of a few days or a week. Substantially similar conditions existed in some parts of California. But in other districts, notably in the territory covered by the withdrawal order here in question, it was frequently necessary, in order to accomplish a discovery, to sink at enormous cost, and by very slow and laborious processes, to a depth often exceeding half a mile. It was not infrequently the case that the actual outlay upon a single incompleated well had already mounted at the date of the President's withdrawal order far into the thousands. Instances are not unknown where upwards of

one hundred thousand dollars, or even more, had at that date been expended upon a single well without any discovery having then been made. Where the owners or claimants were guilty of no acts evidencing an abandonment of their claims,—where in good faith and with proper diligence and at the invitation of the Government they had expended their money and proceeded with their work,—it requires no argument to satisfy the mind of a Chancellor that it would have been grossly unjust, oppressive and immoral if the Government, having long held out the promise of title to these locators or claimants, had suddenly changed its policy, and had with a stroke of its President's pen, confiscated the labor, the permanent improvements, and perhaps the entire fortunes, of such claimants.

If an individual with the expectation of improving his wealth and prosperity thereby,—for the mining laws were intended to enhance the national wealth and prosperity,—had held out a promise of title to his neighbor and had induced efforts and expenditures of like character, it is inconceivable that any court guided by principles of ordinary morality would not have held such person estopped to deny to his neighbor the fruits of his outlay and toil. If the conduct to be expected of the Government rests, as Judge Gilbert has fittingly observed in the quotation above set forth, upon even a higher plane than that which we may assign to mere individuals, there is no room for an interpretation of an order of the nation's Chief Ex-

ecutive which would be consistent only with the atrocious doctrine that "might is right."

We most respectfully submit that this executive withdrawal is worthy of its distinguished author and of this nation, only in the event that its commands are just and equitable. Unless forced thereto by unambiguous language, the Federal Courts, we insist, ought never to consent to an interpretation which would convert this order into an exhibition of arbitrary and despotic power shocking to the conscience.

It follows from the foregoing discussion that the Taft order excludes from the general withdrawal all claims which at its date were held in actual physical possession, provided that in addition to such possession the claimant was using a proper amount of diligence to accomplish a discovery of oil.

THE RULE BY WHICH TO DETERMINE WHETHER A CLAIM IS "VALID AND EXISTING."

It also follows from the authorities already quoted that the test of the sufficiency of the acts alleged to constitute such due diligence is this: Would a Court upon the facts as they existed on September 27, 1909, have felt itself obligated to protect the claimant's possession from hostile intrusion?

THE DILIGENCE REQUIRED OF A LOCATOR TO ENABLE HIM TO HOLD POSSESSION OF HIS CLAIM AGAINST A HOSTILE ENTRY.

The conclusion that the same degree of diligence which would protect the possession of the claimant

against hostile intrusion will likewise bring his claim within the saving clause of the Taft withdrawal order, makes it proper that we next examine the adjudicated cases for the purpose of ascertaining what showing of diligence will entitle such a claimant to the protection of the courts.

The general principles applicable wherever diligent pursuit of any enterprise is called for, are set forth in the following authorities (in all quotations in this brief the emphasis is ours) :

“Diligence is defined to be the ‘steady application to business of any kind, constant effort to accomplish any undertaking.’ *The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the world a bona fide intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work itself.*”

Ophir Silver Mining Co. v. Carpenter, 4 Nev., 535, 546-7.

The case just quoted is undoubtedly the leading authority on the question of diligence, and has been everywhere accepted as declaring the general principle wherewith to test the sufficiency of a claimant's showing. Among the cases wherein it is cited are cases dealing with claimants to oil lands.

See

United States v. Midway Northern Oil Co., 232 Federal, 626;

United States v. McCutcheon, et al. (Equity suit A-12; printed in the Government's brief in this Court in Appeal No. 2660; see p. 72 thereof).

Another comprehensive expression of the general rule is that laid down by the Supreme Court of Washington:

"An examination of the decisions of the courts will show that the question of due diligence on the part of an appropriator in performing work following his notice of appropriation must rest largely upon the facts and circumstances of each particular case. The conditions and necessities of different projects are so varying that it is difficult to make more than a very general statement of a rule of diligence applicable to all cases. Probably as comprehensive a general statement of the rule as the law will warrant is that found in the text in 40 Cyc., at page 711, as follows: 'The appropriator must proceed with reasonable diligence to construct and complete such works as are necessary for the immediate application of the water to the intended use. What is a reasonable time and what constitutes reasonable diligence must depend largely on the facts of the particular case, . . . but it may be said that they depend chiefly on the physical circumstances of the locality, the nature and condition of the region to be traversed and its accessibility, the length of the season in which work is practicable, the supply of labor, and the magnitude and difficulty of the works necessary.'"

State v. Superior Court, 126 Pac., 945, 953.

So much as to the general principles which control the question. We will now refer to the oil cases thus

far decided in which the courts have dealt with the sufficiency of the showing of diligence to justify the occupant in retaining possession of his claim. These cases are of two classes—those which have no relation to the Taft withdrawal order, and one case which is concerned therewith. We will first refer to cases of the former class:

THE DILIGENCE REQUIRED IN CASES BETWEEN
PRIVATE INDIVIDUALS.

In *Weed v. Snook*, 144 Cal., 439, it was held that the showing of diligence was such that it entitled defendants to possession as against a hostile locator. The defendants claimed under a location notice posted by them on June 20, 1900. On November 28, 1900, their lessee "went into actual possession and began the active "work of *preparing* to drill a well thereon for the "discovery of oil." On December 24, 1900, before the lessee commenced its work of drilling upon the location, and while it was erecting its buildings, derricks, and machinery thereon, the plaintiffs entered and located the claim. On this state of facts the Supreme Court said:

"The plaintiffs attempted to locate while defendants were in possession and actively preparing to drill a well. As to the time that elapsed between the date of defendants' location and November of the same year and the reasons why defendants were not actively at work trying to discover oil during all of said time, it is not necessary here to inquire. *As to plaintiffs, it is sufficient that defendants were so in possession and actively at work when they attempted to locate.*"

The Court in said case also quotes with approval the following language from *Kern River Oil Co. v. C. W. Clark*, 30 Land Dec., 550:

“But where the locator is in possession under his location, and is actively at work through his lessees or otherwise, and expending money for the purpose of discovering oil, his rights cannot be forfeited to third parties who attempt to make locations under such circumstances. The law must be given a liberal and equitable interpretation with a view of protecting prior rights acquired in good faith.”

In *Borgwardt v. McKittrick Oil Co.*, 164 Cal., 651, 655, it appears that defendants claimed under a location notice posted on September 19, 1899. More than eight years later, in April, 1908, defendant's Board of Directors voted to order the timber for a rig with which to drill a well on said location. On May 23, 1908, defendant commenced the overhauling and repairing of a water pipeline to be used for drilling the proposed well. On May 28, 1908, defendant brought to the claim certain timber for the construction of their rig and deposited the same thereon, following this with rig lumber on the next day. They also placed the property in possession of an employee. Nothing further appears to have been done prior to the commencement of the suit.

It appears that plaintiff's agent had posted notices of location on May 26, 1908, at a time when no one was in actual physical possession of the land. On that day plaintiff's agent was physically upon the properties. On May 27, 1908, he departed, leaving a man

in a cabin nearby with directions to get two or three other men to watch the claim and stay on the ground. The agent returned to the land on May 29, 1908, with a surveyor to run the lines and found the timber above referred to upon the ground with the said employee of defendant occupying the cabin. The Court said, page 658:

“We do not think that the evidence was of such a nature as to show any voluntary abandonment of this location by defendant.”

It will be noted that the sole activity of the plaintiff, in said action, apart from posting the location notice, had consisted in placing men in a cabin on an adjoining tract of land, with directions to watch the land and walk over it once or twice a day. The Court says of the effect of these acts:

“Whatever may be said as to this as being capable of sustaining a finding of actual possession, it is clear that the evidence is not sufficient to support the finding substantially to the effect that plaintiffs were engaged in the prosecution of discovery work at any time prior to the entry by defendant.”

Borgwardt v. McKittrick Oil Co., 164 Cal., 651, 660.

Another case indicative of what is sufficient diligence to hold a claim is *McLemore v. Express Oil Co.*, 158 Cal., 559: A location notice was posted by defendants in June, 1906. A cabin was constructed upon the claim, its boundaries marked, and some bits of road

built. This had been done upon the theory that it was assessment work. On April 12, 1907, a homestead claimant settled on the land. At that time no work whatever was being prosecuted on the claim. The locators, as the Supreme Court says:

“were not only not in actual possession of the land, as the court finds, but the evidence discloses that what they had done was no more than to attempt to hold the land upon the theory that assessment work was adequate for that purpose. It is shown by the evidence that they were not only not engaged in the diligent prosecution of the work, but that they were not financially able so to prosecute it, and were either in search of capital to enable them to do so, or in search of a purchaser to buy out such interest as it might be thought that they had.”

Upon the facts presented the Court also has this to say:

“This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding, by cabin, lumber pile or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end.”

McLemore v. Express Oil Co., 158 Cal., 551, 563.

The foregoing language is quoted by the Supreme Court of California in the later case of *Borgwardt v. McKittrick Oil Co.*, *supra*, and the Court makes the following observations:

“Under the rule established by the decisions the locator is protected in his possession only when engaged in the diligent prosecution of actual work for a discovery,

and the commencement and continuance of such work are as essential when he complains of interference with his possession, as is the posting of his notice of location. We do not mean to hold that such diligent prosecution of work may not include such actual preparation for the same as the bringing to the claim of the materials necessary therefor. We have no such situation presented by the evidence here, and need not determine exactly what will constitute the diligent prosecution of discovery work. . . . The attempting locator's possession is protected only while he may fairly be held to be actually engaged in such work as may reasonably be held to be discovery work."

Borgwardt v. McKittrick Oil Co., 164 Cal., 650, 661.

In the still later case of *Smith v. Union Oil Co.*, 166 Cal., 217, the facts were as follows:

A location notice was posted on February 5, 1910. The locators immediately took possession, and with the exception of the period from August 17th to August 31st, 1910, during which the land was vacant, the ground had been occupied by the locators and those claiming under them. The trial court found that upon the 7th day of October, 1910, the lessee:

" . . . went upon said placer mining claim, made a location for a well thereon, purchased the lumber that was on the claim, and proceeded to build a wood rig, bunk-house, cook-house, as well as purchase rig irons for the standard oil well drilling rig, and expended more than two thousand (\$2,000.00) dollars."

(See Trans. of Record on Appeal in said case, p. 42.)

The complaint was filed on November 25, 1910. At that time, according to the evidence of the lessee, the extent of the work done was as follows:

"I paid for the lumber that was on the property and had the rig builder go on and proceed to build a rig, houses;—that is bunk-house and cook-house, and paid for building these structures. I also bought rig irons from the National Supply Company, for a standard drilling outfit, there on the property. All of which was moved onto the property at my expense, and I have had someone on the property at all times since the early part of October, to look after it. Since I went on the property in the early part of October, I have spent there more than \$2,000."

ibidem, pp. 73-4.

Another of plaintiff's witnesses testified:

"I saw and was on this property just prior to the filing of the complaint in this action. At that time there was the greater portion of a standard drilling rig, part of it erected, on the property, and the bunk-houses and cook-house. Captain Stowe's representatives were in possession. I was on the property with Captain Stowe. He was preparing to get his well in shape to drill, the derrick up, giving instructions to his men. I was present when he did so."

ibidem, p. 64.

Such was the showing of diligence. The trial court rendered judgment in favor of plaintiff and enjoined the defendant from entering upon the claim. In affirming this judgment the Supreme Court said:

"On October 7th, 1910, the lessee of plaintiff took possession and began work thereon preparatory for the drilling of a well thereon for the purpose of finding oil therein,

which work *he has diligently prosecuted*. At the date of the beginning of this action, November 25, 1910, he had expended some two thousand dollars in said work."

Smith v. Union Oil Company, 166 Cal., 217, 219.

In *Cosmos v. Grey Eagle Oil Co.*, 112 Fed. Rep., 4, 14, this Court of Appeals was concerned with a contest between a claimant under an oil location and a claimant under a forest lieu selection. The Court said that the oil claimants "were diligently at work" to prove their claim to be oil bearing. The facts upon which this Court based this conclusion were found in certain affidavits filed by appellees on a motion for injunction and were as follows:

The location notice was posted on January 11, 1899. The locators went into possession immediately. On or about July 1, 1899, they dug a prospect shaft to a depth of sixty feet. They were then enjoined from proceeding with this work, *but the injunction was dissolved within the same month*. It is to be particularly noted that no drilling plant was placed upon the property until some six months later in January, 1900. In the meantime, on December 9, 1899, the plaintiff's predecessor attempted to select the land as forest lieu. This delay in beginning drilling operations does not appear to have impressed this Court as unreasonable, for the Court says:

"From the allegations of the bill it appears that at the time of appellants' selection of the lands in question

no discovery of any mineral had been made. Appellees could not at that time have acquired any title to the lands included in their locations. The discovery of mineral was essential for that purpose, but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. They were in occupancy of the land they had located. They claimed it to be mineral *and were diligently at work to prove it to be such.*"

A CASE INVOLVING "DUE DILIGENCE" IN RELATION TO THE TAFT WITHDRAWAL ORDER.

In *United States v. George W. McCutcheon, Obispo Oil Company, et al.*, Equity suit No. A-12 (Southern District of California), Judge Bledsoe, as we have already seen, gave to the Taft withdrawal order the meaning which we are here pressing upon the Court. Having reached the conclusion that the Obispo Oil Company, one of the defendants, was entitled to its claim if as matter of fact it was using due diligence in the prosecution of work on the 27th day of September, 1909, the learned Judge proceeded to measure the facts before him with the rules of due diligence applicable to controversies between individuals. He also was called upon to interpret the phrase of the Pickett Bill which would have entitled the said Obispo Oil Company to possession if it could properly be said that said corporation was "in diligent prosecution of work leading to discovery of oil or gas" at the date of the withdrawal order.

The facts in that case were these: The said Obispo Oil Company had entered upon its claim on March 1, 1909, and was diligently engaged in drilling for oil on

said property until some time in the month of July, 1909. It had expended many thousands of dollars. It had then exhausted all of its available funds and the work of drilling was stopped. By August 5th—over seven weeks before the Taft withdrawal order was made—it had discharged its crew, had shut down the well, and left the property in charge of a keeper. A short time thereafter this man was displaced by another man whose work was upon an adjoining piece of property but who moved into a house on the property claimed by the Obispo Oil Company and lived there rent free, simply “to hold it for the company.” The Obispo Oil Company never resumed work. Nothing further was done upon the property in the way of work until the following February, 1910, when the successor of said corporation began operations. The sole reason why the Obispo Oil Company stopped work was lack of funds. The case is undoubtedly a hard one, but Judge Bledsoe reached the same conclusion which the Land Office already had reached—viz: that to take any location or claim out of the general effect of the Taft withdrawal order the law inexorably required that the work must, *in the absence of a valid excuse*, be in actual progress upon the date of the Taft withdrawal. He further held that the mere fact that on August 5, 1909, the company had exhausted its funds and had no money with which to proceed with the drilling, was not an excuse for the failure to be at work on September 27, 1909, which the

Court could take cognizance of. The Court, upon that point, relied upon the case of *Ophir Silver Mining Co. v. Carpenter*, 4 Nev., 534.

The doctrine that to constitute a valid excuse for delay in actual work the occasion for the delay must be incident to the work, and not personal to the individual is thus expressed by Judge Hawley in his very able opinion in said case:

“ . . . If it were admitted, however, that his illness constituted a valid excuse for a want of diligence, it would only excuse it whilst such illness continued, which was only for a short time in the early part of 1860. But we are inclined to believe that his illness is not a circumstance which can be taken into consideration at all. Like the pecuniary condition of a person, it is not one of those matters incident to the enterprise, but rather to the person. The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character.”

Ophir Silver Mining Co. v. Carpenter, supra.

It is further to be noted that in said decision Judge Bledsoe lays stress upon the fact that the previous expenditures of the Obispo Company could not be regarded as evidencing due diligence on the date of the withdrawal, for the reason that the outlays had contributed nothing to the discovery ultimately made. He says in this connection:

“ . . . no discovery of oil at any time upon the premises in controversy in the McCutcheon case was made through, or by means of, or at a place developed by, the moneys laid out by the Obispo Company. . . . In this wise it may be said, as I view the situation, that the ex-

penditures of the Obispo Company as heretofore indicated, contributed in no degree or respect to the discovery of oil, *and should not now be held as evidence of due diligence at the time of the withdrawal order.*"

The foregoing decision of Judge Bledsoe is, as already stated, the only one, so far as we are advised, wherein any court has heretofore undertaken to define what constitutes an "existing and valid" claim or location, within the meaning of President Taft's order.

APPELLANTS' SHOWING OF DILIGENCE BRINGS THIS CASE CLEARLY WITHIN THE FOREGOING RULES.

We have now given to the Court such assistance as we can from the cases which deal with particular facts. We shall under this head assume that the Court accepts our interpretation of the words "locations or claims existing and valid," used by President Taft in the withdrawal order.

If the undisputed facts now before this Court are such that if this were a suit filed by us on September 27, 1909, to eject or enjoin an intruder who had effected a hostile entry upon that date, we would be entitled to judgment, it follows *a fortiori* that we have made out our present case. This, we insist, is the sole test by which our right is to be determined.

Summary of the Rules Wherewith to Measure the Facts.

The result of the foregoing presentation of authority is that in all of the oil cases thus far decided the

courts have followed the general principles declared in *Ophir Silver Mining Company v. Carpenter*, 4 Nev., 534, and the following is, we submit, a fair summary of the law wherewith our conduct is to be measured:

To constitute a claim which the Court would have protected against intrusion—and hence to constitute a valid and existing claim such as President Taft intended to protect—the occupant must have been on September 27, 1908, using “such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time”; he must have been performing an act or series of acts to effect a discovery “with all practical expedition,—with no delay, except such as may be incident to the work itself.” The lack of funds with which to go ahead on September 27, 1909, or any other moving cause that may properly be said to be purely personal to the individual, will afford no excuse for any stoppage of work at or before the said date. The efforts of the claimant need not be “unusual or extraordinary,” but are sufficient if they are “ordinary and reasonable.” And finally, the activities of the claimant will be held to constitute ordinary and reasonable diligence if notwithstanding the fact that his work or any part of it was not in actual physical progress on September 27, 1909, it appears, nevertheless, that the delay or shutdown at said date was occasioned by circumstances or conditions which

would likewise affect "any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character."

Topographical and Climatic Conditions.

Before proceeding to discuss the specific acts of diligence upon which we rely, the Court should have in mind the topographical and climatic conditions of the district in which these lands are situated.

The authorities already quoted by us declare the law to be that:

" . . . what constitutes reasonable diligence must depend largely upon the facts of the particular case. . . . But it may be said that they depend chiefly upon the physical circumstances of the locality, the nature and condition of the region to be traversed, and its accessibility, the length of the season in which work is practicable, the supply of labor, and the magnitude and difficulty of the works necessary."

State v. Superior Court, 126 Pac., 945, 953.

Our affidavits—and they are not disputed—make the following showing:

"The whole country is an arid country; almost desert in character, with practically no vegetation and no surface water" (Tr. p. 74).

A well had been sunk to some depth on the section in controversy, prior to September 27, 1909, in a fruitless quest for water (Tr. p. 62).

On the adjoining section (Sec. 1) the Standard

Oil Company, in 1908, had also unsuccessfully bored for water (Tr. p. 85).

The Possible Sources of Water Supply.

The only sources of public water supply available to any portion of the public anywhere in that field during 1909 were two small and very inadequate water systems—one then owned by H. C. Stratton, which was afterwards turned over to the Stratton Water Company, and the other owned by a corporation called the Chanslor-Canfield Midway Oil Company, which system was in fact owned and operated by the Santa Fe Railroad Company (Tr., p. 70).

Neither of these companies had piped their water to a point nearer than several miles from this section (Tr., pp. 73-4); and the very important fact is presented that long prior to September 27, 1909, both of said water companies had already oversold their very limited supplies of water, and that neither of said corporations had water which appellants' predecessor could have purchased during the said year of 1909 (Tr. pp. 70-72, 66, 69, 81, 86, 59-60, 62).

It is also noticeable that the Chanslor-Canfield Company had been compelled to go some twenty-five miles for its scanty supply of water (Tr. 82). In April, 1909, said Chanslor-Canfield Company began the construction of a six-inch pipe line to take the place of its former three-inch pipe line, but when completed it was found that there was not sufficient

water. The sinking of additional wells was begun by said company in October, 1909,—one month after the date of the Taft withdrawal order—but these wells were not in operation until October, 1910; and even then the supply was not materially greater than that furnished by the old line (Tr. p. 83).

The Standard Oil Company, with its enormous resources, had developed a water supply at a distance of twenty-three miles from Taft (Tr. 85). And Taft was about two miles from the property in controversy. It used its pipe line in alternately pumping first oil and then water for use in drilling, but refused to supply third persons with any water (Tr. p. 85).

The appellants' showing admits "that water could "have been hauled in wagons for many miles and "across a country having no roads. It would have "been a physical possibility to have drilled wells in "this manner, but as a practical, commercial proposition it was absolutely prohibitive" (Tr. 74).

Of other lands situate in this same oil district Judge Bean recently said:

"The lands in controversy are situate in an arid section of the State, and until late in 1909 or early in 1910, it was difficult, if not impracticable, to obtain water in sufficient quantities for drilling."

United States v. Midway Northern Oil Co.,
232 Fed., 232.

The Activities Upon These Lands Evidencing Due Diligence.

In 1909 and prior to the 27th day of September, 1909, this section had been covered by four mining locations under the placer mining laws (Tr. pp. 58, 19, 20, 8, 9).

The Government has not attacked the *bona fides* of any of the locators.

The Pioneer Midway Oil Company was in actual possession under these locations on September 27, 1909 (Tr. pp. 58, 61).

As early as June, 1909, the said corporation had determined to drill at the earliest possible moment at least one well on each of the said claims (Tr. p. 61).

Shortly prior to June 21, 1909, pursuant to the intention thus formed, orders were given to the superintendent of the corporation that a camp be established upon said section for the purpose of drilling such wells (Tr., pp. 61-2).

On said 21st day of June, 1909, contemporaneously with the order to establish said camp, two boilers for use in drilling oil wells on said section were purchased (Tr., p. 61). The superintendent in charge of the property reported on the same date that "as soon as possible" he would establish the camp on the section and would commence the erection of said boilers (Tr., p. 62).

Sometime between June 21st and the 27th day of September, 1909, the boilers so purchased were taken to the section of land in controversy and were deposited at a point near the center of the section at a place where the same, when set up, could be used for drilling wells on all four of the claims (Tr., p. 61). The precise date upon which these boilers were taken to the ground is not clear, but it was probably shortly before the 27th day of September, 1909 (Tr., p. 61).

It also appears that prior to the 27th day of September, 1909, said corporation "caused to be erected on each of said quarter sections of land a dwelling house for its men and a complete standard drilling rig." This drilling rig included a derrick, an engine-house, a belthouse and rig irons (Tr., p. 58).

In the erection of these improvements alone, and apart from all other outlay upon the property the corporation had expended several thousand dollars prior to September 29, 1909 (Tr., p. 58).

A supply of water was, of course, just as essential to the proposed drilling operations as was the derrick, the tools, the fuel, or the necessary labor to operate the rig. In this regard the showing is, that during the year 1909, and prior to the 27th day of September of that year, the manager of said corporation caused a well to be sunk upon the said property with the hope of finding water. This hole was sunk to a considera-

ble depth, but no water was discovered therein (Tr., p. 62).

The manager of the company deposes that he made a constant and diligent effort to secure an adequate supply of water for drilling during all of the period from the completion of said derricks up to the time when the property passed to appellants in March, 1910 (Tr., pp. 59-64).

Also "that during the whole of the said period of "time the Pioneer Midway Oil Company was ready "and willing and had the necessary funds for drilling "a well on each of said quarter sections, and was "diligently and continuously endeavoring to secure "the necessary water so to do, and it was owing to "the utter impossibility of getting sufficient water that "the actual work of drilling was not started" (Tr., p. 60).

And again he says "that the said corporation was "ready, able, anxious, and willing to proceed with "drilling wells upon each of the four quarters of "said section and would have begun the drilling "thereon immediately after said 21st day of June, "1909, but for the said difficulty with water" (Tr., p. 63).

The diligence of the efforts to secure water is, we submit, sufficiently evidenced by the actual sinking of the aforesaid well (Tr., p. 62).

A corroborative circumstance is, that early in 1910, when Mr. Titus inquired of the owners if they would

purchase water for drilling if it were brought in by him and his associates under a project they then were contemplating, he was assured in reply "that they would be only too glad to purchase water from affiant or from any one else who could furnish it to them" (Tr., p. 77).

On the crucial date—September 27, 1909—employees of the corporation were in actual physical possession of each of the four quarters of the section, were actually living thereon, and were performing labor on each of the said four claims in preparation for drilling operations thereon, such as clearing away the brush and leveling the ground for the construction of the proposed drilling plants (Tr., p. 63).

To the showing of diligence thus made, we ask the Court to add an inference which from the facts disclosed, is clearly in evidence; viz., that under the circumstances it was a more rational thing for the Pioneer Midway Oil Company to count upon getting water within a reasonable time from one or the other of the said water companies, than it would have been for it to have rushed off to inaugurate the construction of a water system which would not only have been enormously expensive, but the construction of which would in all probability have occasioned an even greater delay in beginning the work of actual drilling. We have already seen that neither of the two corporations which dispensed water to consumers was in a position to sell any water to the Pioneer

Midway Oil Company on September 27, 1909. The obligations of the said corporations were then in excess of their capacities. But here is the point: It is a matter of common knowledge that the hopes and expectations of those who undertake drilling operations in a new oil field for the purpose of discovering oil are very often disappointed. While the water supplies of these two corporations were limited, it was natural to assume that in that field the experience would be the usual one and that now and then a customer would voluntarily drop from the list of consumers, or become insolvent and be dropped for non-payment. The very fact that there was a waiting list of customers who wanted to get water shows what the expectations of men in that field actually were under the then existing circumstances (Tr., p. 84).

It is shown, moreover, that both of the water companies were during this very period endeavoring to increase their water supplies (Tr., pp. 68, 82-3), and this would give occasion for legitimate hope to those who desired water. The completion of wells resulting in discovery would also have a material effect in releasing water to such companies.

The inference which we ask the Court to adopt is, that a sensible man, exercising reasonable diligence, would properly expect that within a reasonable period of time—probably in the course of a few months at most—he would be able to secure water from one of the two water companies, and it appears that in

fact this is exactly what happened. Within less than six months,—in March, 1910,—permission was obtained from the Union Oil Company “to make a connection with their water line through which they were getting water from the Stratton Water Company” (Tr., p. 64).

The question plainly put is this: Since the law does not require any unusual or extraordinary efforts, but only “that which is usual, ordinary, and reasonable,” what course of conduct should a Court exact of the occupant of a mining claim under the conditions here presented? Will the Court say that under the circumstances of this case he must not only have undertaken to bring water on to his claim, however great the expense, but that he must needs have decided upon that course and have commenced active work to bring in such water contemporaneously with the erection of his derricks, and that all of this must be started prior to September 27, 1909? If this course had been pursued in the case at bar obviously water could not have been thereby obtained any sooner than it was in fact obtained. Not only does this seem obvious, but Mr. Titus, a man of very wide experience in such matters, as his affidavit deposes:

“That as a practical commercial proposition it was impossible to have procured water for Section 2 for the purpose of drilling, at any earlier time than the same was actually procured; that he was thoroughly familiar with all possible sources of water supply during 1909 and 1910 for said locality; and that this affiant does not believe that by any degree of diligence or any expendi-

ture within the bounds of reason any supply of water sufficient for drilling purposes would have been procured in any manner for Section 2 at any earlier period of time than the same was actually procured" (Tr., pp. 76-77).

We respectfully submit, therefore, that so far as the question of a water supply is concerned, we have made a satisfactory showing of reasonable diligence at the date of the Taft withdrawal order.

It only remains to consider whether or not the other activities shown by the evidence were proceeding with sufficient rapidity upon that date to meet the measure laid down by the courts in the decided cases. Again we ask the Court to bear in mind that the efforts which the law exacts are those only which are "usual, ordinary and reasonable." "That constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs," is all that is required.

If it be said that we should have installed machinery even though we had no immediate prospect of getting water with which to operate it, the answer is that such would not have been the usual, or the sensible course. We had brought our plant to a point where it was ready for the tools and machinery, and a few days' work would place it in a condition to start drilling operations whenever we had water. Derricks, belthouses, engine-houses and bunkhouses were complete and ready for the machinery. These

structures were actually used by the Government's witness, Mr. Tryon, in drilling on the property. He arrived on March 15, 1910. He found our improvements. The necessary drilling rig was ordered and purchased shortly thereafter (Tr., p. 52), and notwithstanding the fact that the railroad failed to deliver freight promptly (Tr., pp. 64, 56), and notwithstanding a delay of three weeks in getting water through the pipeline after the line was finished (Tr., p. 64), actual drilling commenced on April 28, 1910 (Tr., p. 64).

It would thus appear that notwithstanding these difficulties and delays all of the machinery was purchased and installed ready for work within a period of less than three weeks.

As between purchasing and setting up machinery which might, owing to the difficulty of procuring water, lie idle and suffer deterioration through an indefinite period, and postponing the actual drilling operations for about two weeks, there can be no dispute, we think, as to what is the sensible thing for a man to do "who desires to complete his work within a reasonable time." The setting up of the machinery includes the preparation and leveling of the land. The Government's own affidavit thus shows that the plant had been brought to a point where a very small amount of work extending over a few days served to get it ready for active operations. There was nothing that could not be easily gotten ready by the

time that the water was on the ground. In this connection the action of the Supreme Court in holding the following instructions to be a correct expression of the law, is in point:

"7. The law does not require a vain or useless thing to be done; that therefore the plaintiffs were not required by the law of due diligence, to complete their ditch before they could successfully use it for the purpose for which they dug it.

"8. If the tunnel through the ridge was a necessary part of the plaintiffs' ditch, without which it could not be used, then it was only necessary for the said plaintiffs to complete their said ditch by the time they could, with reasonable diligence, succeed in preparing their tunnel for use."

Kimball v. Gearhart, 12 Cal., 27, 30.

The foregoing considerations, we respectfully insist, amount to a demonstration so convincing as to scarcely leave open to argument what the judgment of a court must needs have been if on September 27, 1909, we had come into court to protect our possession against an intruder. That we could have maintained ejectment upon this showing, or that an injunction would have been granted to restrain the intruder, seems to us the only possible course for a court to have pursued. Once this conclusion is reached, it follows, as we have seen, that this land was excluded from the Taft withdrawal order by the force and intent of the President's language.

II.

RIGHTS OF APPELLANTS AS MEASURED BY THE
PICKETT BILL.

If actual discovery of oil or gas is not essential to the validity and existence of a location or claim within the meaning of the words of the Taft withdrawal order, it follows from the preceding discussion that these appellants have no occasion to invoke the remedial clause of the Pickett Bill.

But if this Court shall hold that all locations or claims within the designated area not already perfected by discovery on September 27, 1909, were wiped out by said order, no matter how diligent the occupant may have been, then appellants may nevertheless turn for relief with complete confidence to the said act of Congress of June 25, 1910.

The remedial proviso in the Pickett Bill reads as follows:

“Provided, that the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work.”

Whatever else may be the scope of this Act, it is very obvious that it extends to all cases where at the date of the Taft withdrawal order there was an actual occupation of the oil or gas bearing land, accom-

panied by a diligent prosecution of work leading to discovery of oil or gas; for the Act deals expressly with cases of the particular class upon which there was or should be no discovery at the date of the withdrawal.

The said Act has a much wider scope than is thus indicated, but it is not our purpose to go into that matter here. It is enough so far as the case before the Court is concerned, that the Act in question extends its protection to claimants who were in actual possession when the Taft withdrawal was made, and who at said date were exercising the proper diligence to discover oil.

There is, we think, no difference of opinion between appellants' counsel and the learned Attorney General as to the effect of the Pickett Bill upon unperfected claims where the claimant was in actual possession; for in his letter of April 12, 1916, addressed to the Secretary of the Interior, the learned Attorney General says:

"These persons under the existing law were entitled to enter upon the public lands, to survey and mark the portions desired, to explore for oil and gas, and upon discovery to take title ultimately by patent. So long as they were diligently and in good faith engaged in prosecuting the work of discovery they were entitled to possession and to protection against clandestine and hostile entry by others. *Miller v. Chrisman* (140 Cal., 440; 197 U. S., 313); *McLemore v. Express Oil Co.* (158 Cal., 559); *Borgwardt v. McKittrick* (164 Cal., 650).

"The proviso to the Pickett Act protected this explorer's right from the order of withdrawal to the same extent and upon the same conditions as it was protected by pre-existing law against private intruders."

We are in full agreement with counsel for the Government upon this point so far as our claims are concerned. In the foregoing pages we have shown that the possession and diligence of appellants' predecessor in interest were such at the date of the withdrawal order that said predecessor would have been protected against private intruders by the pre-existing law. It only remains, therefore, to show that appellants have complied with the further provision of the Pickett Bill which requires that the claimant shall continue in diligent prosecution of work leading to discovery in order to prevent a lapse of his rights.

THE ACT REQUIRES THAT DILIGENCE AT THE DATE OF THE TAFT WITHDRAWAL ORDER BE COUPLED WITH LIKE DILIGENCE AFTER THE PASSAGE OF THE ACT.

The language of the Act is that the rights of claimants or occupants belonging to the designated class "shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work."

It is to be particularly noted that Congress has exacted nothing from the person in possession at the date of the Taft withdrawal, in the way of diligence during the period which passed between said date and the date of the Pickett Bill itself. The Act requires that there shall have been the necessary diligence at the date of the order, and it further requires, so far as withdrawals theretofore made are concerned, that

after the passage of the act the claimant "shall continue" to exercise like diligence or suffer the penalty of having his rights lapse and his claims fall back into the withdrawn area.

There was an obvious propriety in the provision as thus framed. For it would have been a singular anomaly had Congress undertaken to penalize the claimant who obeyed the order of withdrawal, and stopped his work, while it placed a premium upon the conduct of the claimant who defied the executive authority.

When the Taft withdrawal order was made, the claimant in possession was confronted with a choice of several courses. If he believed the order to be valid and binding upon him, his obligations as a law-abiding citizen demanded that he close down his work and surrender his possession to the Government. If on the other hand, he labored under the belief that the order was without any validity whatever, then in all likelihood he would disregard it and proceed to carry on his efforts to discover oil. And finally, if he were doubtful as to the President's authority to withdraw the land, and yet regarded the order, as its phraseology would justify, as a mere temporary withdrawal at most, he might conclude to shut down work, remain in possession, and thus endeavor to preserve the *status quo* until Congress should act or until the question of the President's power in the matter should be finally settled.

It is not conceivable that Congress could have intended to penalize those claimants who did not openly dispute and defy the Presidential authority. Language of the most unequivocal character only, would justify the imputation of such an intent to the framers of the Pickett Bill. But here such a construction not only leads to ridiculous results, but it is not grammatically possible. Congress has not said, even by remote inference, that the rights of a claimant under an order of withdrawal theretofore made shall be protected, provided he *shall have* continued in diligent prosecution of said work from the date of the withdrawal. On the contrary, the phraseology looks to the future only, and expressly declares that the rights of the designated class of occupants or claimants shall not be affected or impaired "so long as such occupant or claimant *shall* continue in diligent prosecution of said work"—a phraseology which, so far as the Taft withdrawal order is concerned, unequivocally relates to the future conduct of the claimant. Had anything else been intended, the phraseology would not have been that just quoted. It would, on the contrary, have been to the effect that "the claimants' rights shall not be impaired if he shall have continued in diligent prosecution of said work from and after the date of the order."

The said Act, therefore, is concerned only with the situation on September 27, 1909, and with the period which followed the 25th day of June, 1910. The

showing of appellants covers this period, but we shall here deal only with the situation of September 27, 1909, and with that on and after June 25, 1910.

As already pointed out, the affidavits before the Court make it clear that on September 27, 1909, appellants' predecessor, Pioneer Midway Oil Company, was occupying these claims and within the meaning of the law of due diligence, was in the diligent prosecution of work leading to discovery of oil or gas. These facts we have discussed and established in the foregoing pages (see pp. 30-43).

CLAIMANTS' SHOWING OF DILIGENCE AFTER THE PASSAGE OF THE PICKETT BILL.

We do not understand that our diligence on and after June 25, 1910, is questioned by the Government. Actual drilling was in progress on the southeast quarter of said section before the 28th day of May, 1910, and on the southwest quarter on the 20th day of June, 1910 (Tr., p. 53). The necessary tools and machinery for drilling the well on the northwest quarter began to arrive in the month of June, 1910, and actual drilling operations began on the 25th day of July, 1910 (Tr., p. 54). Tools and supplies arrived for the well on the northeast quarter from time to time in June, and during the last of June or the first part of July, 1910, the actual work of equipping the drilling rig began, and actual drilling operations began on the 5th day of September, 1910.

The Government relies upon the evidence of Schuyler G. Tryon, who from the beginning superintended all of the drilling work and who remained in charge thereof until sometime in 1911. The Government itself makes the following showing in Mr. Tryon's affidavit:

"That during the entire time that affiant was in charge of drilling operations on said Section 2, the said drilling operations proceeded with all possible diligence and all said wells aforesaid were drilled as expeditiously as possible under existing conditions as to water and delivery of freight" (Tr., p. 56).

The Government has also offered an affidavit showing that at the time of the commencement of the action there were ten completed wells upon the property (Tr., p. 57).

That the work has been prosecuted diligently since the passage of the Pickett Bill is therefore clear.

It follows that the Pickett Bill fully protects our rights—even if our lands were for a time withdrawn by the Taft withdrawal order.

DECISIONS INTERPRETING THE PICKETT BILL.

There are two decisions which it may be well to call to the Court's attention before we leave this subject.

In a case entitled *United States v. Ohio Oil Company*, which arose in the United States District Court for the District of Wyoming, the Court had before it the following facts:

The lands involved were embraced in a withdrawal order dated May 6, 1914. They had been located early in the same year. In April, 1914, representatives of the locators and of defendant company together "examined the lands." In the last part of April, 1914, defendant corporation took an oral agreement to lease the claim and agreed thereby to proceed with the drilling of wells. The defendant company "at once" employed one Virgil Jackson and "left him in charge of the claims." This it will be noted was in the last part of April. On May 4, 1914,—two days before the withdrawal order there in question was made—the defendant corporation directed that certain materials owned by it and stored at Casper be loaded on the cars for shipment to Kirby, the nearest railroad point. On the same day lumber was ordered to be delivered on the lands and "a carpenter was employed to construct certain necessary buildings." On May 5th a contract was entered into with a man to drill wells on the claim in controversy. Pursuant to this oral contract of lease the Court finds that the defendant had "expended and obligated" itself for materials necessary to the work of drilling wells on the two claims in controversy, in the sum of \$2,000.00 or more. This was one day before the order was made. It would seem that on May 6, 1914, a temporary camp had been established on the property. The proceedings had arrived at the stage we have indicated when the withdrawal order

became effective. Not until May 7th,—one day after the withdrawal order was made,—did any of the materials previously ordered arrive, and not until then was the construction of anything,—not even a permanent camp,—begun. Upon the foregoing facts Judge Riner held:

“That the defendants were *bona fide* occupants and claimants of the oil bearing lands in controversy and were engaged in the diligent prosecution of the work leading to the discovery of oil in commercial quantities on said lands at the date of the withdrawal order made by the President, to wit: the 6th day of May, 1914.”

United States v. The Ohio Oil Company, et al.,
Suit No. 852 (District of Wyoming).

A recent case which seems to call for some comment arose in the Southern District of California. In *United States v. Midway Northern Oil Company*, 232 Fed., 619, Judge Bean was confronted with the following facts:

“No discovery of oil had been made on any of the lands at the date of the first withdrawal order, nor was any one in possession thereof at that time actually engaged in work looking to a discovery . . . nor any work done thereon, except some so-called assessment work, which consisted in excavating sump holes, building small cabins, and the erection of a couple of derricks on one of the tracts, which derricks were never used or equipped for drilling, but were subsequently taken down and removed to other parts of the premises” (p. 623).

The learned Judge says regarding the proviso in the Pickett Bill (*italics ours*):

"To come within this provision it is essential that the party claiming the benefit thereof was a *bona fide* occupant or claimant at the date of the withdrawal, and at that time in diligent prosecution of work leading to a discovery. Now, the evidence shows, and it is undisputed, that the defendants in none of the cases were engaged in the prosecution of work leading to discovery of oil or gas at the date of the first withdrawal order, *or in fact doing any work at all. Indeed, no work had been done on any of the tracts for months prior to the order, and then only so-called assessment work*, which was of no effect as against the government, since assessment work must follow, and not precede, discovery" (p. 625).

"The lands in controversy are situate in an arid section of the State, and until late in 1909 or early in 1910 it was difficult, if not impracticable, to obtain water in sufficient quantities for successful drilling; but I do not think that fact brings the cases within the terms of the law.

"There is no intention manifest in the statute, as far as I can see, to protect or confer any rights on those who had *merely* made a filing prior to the withdrawal order, but who were unable to engage in work looking to discovery, but only those who were at the date of the order *bona fide* occupants or claimants of the lands withdrawn and *actually engaged in the diligent prosecution of such work.*"

"Now, *the mere effort*, however diligent, to obtain water for drilling purposes, or the inability to do so, which is all the evidence for the defendants tends to show, cannot be held to constitute diligent prosecution of work looking to discovery any more than the pursuit of capital to prosecute such work, or a lumber pile or unused derrick, can be held to constitute such diligence. *The question is not whether the defendants were able to prosecute the work of discovery at the date of the withdrawal order, but whether they were actually engaged in such work at that time*" (p. 626).

United States v. Midway Northern Oil Co.,
232 Fed., 619, 626.

[We ask the Court to bear in mind that it is not essential to the purposes of the case at bar that we take issue with the foregoing conclusions of Judge Bean. The showing of these appellants is that upon the very date of the withdrawal order a crew of men employed by the claimant was upon the property in controversy and was actually engaged in the prosecution of work necessary to the proposed drilling operations. Ours, in other words, is not a case where the work was not literally in progress on the said date.

Nor are we to be understood as here questioning the correctness of Judge Bean's ultimate conclusion upon the facts before him in the cases to which his opinion is addressed.]

The substance of Judge Bean's conclusions, if we correctly appreciate his words, is that the act does not protect those who have merely made a paper filing; who at the date of the withdrawal had never done any actual work whatever leading to a discovery of oil; who for months prior to the withdrawal order had done no work of any kind whatever upon the tract; and who never at any time had attempted to do any work or erect any improvements thereon other than in the way of assessment work; and where it could not even be said that such assessment work had contributed in any manner toward a discovery of oil or gas. And he further holds that claimants who make a showing no better than the foregoing cannot be excused by proof that it was difficult or impracticable or perhaps impossible to obtain water with which to drill. And that no "mere effort," however diligent, to obtain water, or even an

inability to obtain it, will of itself, when coupled only with a paper location and some so-called "assessment work," constitute "diligent prosecution of work looking to discovery," within the meaning of the Act. By "*mere* effort" to obtain water, we understand the learned Judge to mean an attempt by word of mouth or other negotiation unaccompanied by any physical undertaking either upon the land or elsewhere. We do not think he intended to hold literally that an effort to bring water on the property would be entitled to no consideration in any case. In short, work of building a long but uncompleted pipe-line or the sinking of an unsuccessful water well would not be held to be "*mere*" effort within the learned Judge's meaning, if we correctly apprehend him. Nor do we think that he intended to be understood as indicating that where parties are in possession and actually at work preparing their claims for drilling, and where they have placed the necessary structures on the ground, evidence of diligent effort by negotiation to obtain water coupled with the physical impossibility of obtaining it at the moment, would not be circumstances tending to show that there was no lack of diligence in beginning operations, and so to excuse any seeming tardiness in starting to drill—particularly if it be shown that water was obtained and that drilling began within a period of time reasonable under all of the conditions.

So interpreted we have no occasion on this appeal to find fault with Judge Bean's decision.

It is not possible, we think, that the learned Judge can have intended to hold that under no circumstances, and regardless of elaborate preparations, improvements, outlays and activities upon the property, a failure to have secured a water supply by the 27th day of September, 1909, deprives claimant of protection under the Act; for he himself adopts as a correct exposition of the law the following expressions of Judge Hawley in *Ophir Silver Mining Company v. Carpenter*, 4 Nev., 534, 538:

"The Supreme Court of Nevada, in *Ophir Silver Mining Company v. Carpenter*, 4 Nev., 538, 97 Am. Dec., 550, after saying, 'Diligence is defined to be the "steady application to business of any kind, constant effort to accomplish any undertaking,"' adds:

"It 'is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs; such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, **except such as may be incident to the work itself.**'"

United States v. Midway Northern Oil Co.,
232 Fed., 619, 626.

And Judge Bean could hardly have overlooked the fact that Judge Hawley goes on in the same opinion to define the sort of delays which are properly "incident to the work" as follows:

"But we are inclined to believe that his illness is not a circumstance which can be taken into consideration at

all. Like the pecuniary condition of a person, it is not one of those matters incident to the enterprise, but rather to the person. The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character."

Ophir Silver Mining Co. v. Carpenter, 4 Nev., 534, 97 Am. Dec., 550, 555-6.

Delay in operations resulting from the utter impossibility of obtaining at the moment any essential to the work of drilling, such as machinery, or fuel, or water, would obviously bring the case within the foregoing rule. It thus seems clear that Judge Bean did not intend to narrow Judge Hawley's expressions.

Judge Hawley's views as thus expressed are statements of an established principle. Thus in an early California case (1859) the following instruction was held to be a correct expression of the law:

"That in determining the question of plaintiffs' diligence in the construction of their ditch, the jury have a right to take into consideration the circumstances surrounding them at the date of their alleged appropriation, such as the nature and climate of the country traversed by said ditch, together with all the difficulties of procuring labor and materials necessary in such cases."

Kimball v. Gearhart, 12 Cal., 27, 30.

So also in *Sand Point, etc. Co. v. Pan Handle Dev. Co.*, 83 Pac., 347, 349, it was contended that the defendant who had taken up a water right in December, 1902, and who had not completed his ditch in Feb-

ruary, 1904, did not show due diligence. But the Court said:

"It seems to us, however, when we consider that this work was being prosecuted in a mountainous section of the State where there is a very heavy snowfall and a long winter season with much rough and stormy weather which would interrupt and delay the character of work that was being carried on, that the amount and kind of work which is shown to have been done evidences good faith, reasonable diligence, and a purpose to complete the work and apply the waters to the beneficial use designated."

Many other illustrative cases might be cited to the same effect.

These authorities, coupled with the remedial character of the Pickett Bill, and the absence of any expression in the bill itself which indicates that the word "diligent" is to have other than its usual meaning, lead us to the conclusion that the Pickett Bill makes the usual allowance for delays incident to the work itself.

Like all remedial statutes the Pickett Bill is entitled to a liberal interpretation. That said bill was framed and intended for the protection of all such occupants of public lands as would have been protected by the courts on September 27, 1909, had a controversy arisen between individuals claiming adversely, has not been supposed to be open to doubt, for the learned Attorney General himself says in his letter to the Secretary of the Interior, dated April 12, 1916:

"The proviso to the Pickett Act protected this explorer's right from the order of withdrawal to the same extent

and upon the same conditions as it was protected by pre-existing law against private intruders.”

This calls for the usual rule of diligence as laid down by Judge Hawley in the passages hereinabove set forth.

IN CONCLUSION.

When the Government submits itself to the jurisdiction of its courts, its position is that of any other suitor. The Courts of the United States sitting in equity will no more depart from the established doctrines of jurisprudence in response to the demands of the Government than they will in the case of the humblest suitor. If this be not true, then repeated judicial declaration to that effect is a mockery and a farce. For example see:

United States v. Grand Rapids Co., 154 Fed., 136;

United States v. Grand Rapids Co., 165 Fed., 297;

United States v. C., M. & St. P. Ry., 207 Fed., 179;

Hemmer v. United States, 204 Fed., 898.

One of the settled doctrines of Chancery is that:

“ . . . courts do not lightly enjoin parties from operating properties in their possession, nor appoint receivers to take property out of their possession. *Nevada Sierra Oil Co. v. Home Oil Co.* (C. P., 98 Fed., 674; 20 *Am. and*

Eng. Enc. Law, pp. 18, 21, and cases there cited). The fundamental question in every suit in equity is, on which side is justice?"

Cosmos, etc. Co. v. Gray Eagle Co., 104 Fed.,
32.

"... the power of appointing receivers is one which should be sparingly exercised, and with great caution and circumspection, and only where the circumstances relied upon to warrant the appointment are made to appear by clear proof."

24 *Am. & Eng. Encyc.*, 1038.

If we are correct either in our interpretation of the Taft withdrawal order or in our construction of the Pickett Bill, it follows, we respectfully insist, that the Government has made no showing which justified the action of the Court below. Our affidavits are not only not in contradiction with those filed in behalf of the Government, but the latter tend to support them in important particulars. These affidavits, as we have shown, disclose a state of facts upon which any court of competent jurisdiction must needs have protected the possession of appellants' predecessor in interest from any form of hostile interference by private intruder. Such a showing necessarily means that if nothing else appears upon the trial, these appellants—and not the Government—will be entitled to judgment.

The decisions may be searched in vain for a case where any court upon such a state of facts has held the appointment of a receiver to be proper. It surely

will not be claimed that solely because the Government is the plaintiff, the wholesome rules of equity are to be departed from and the appointment of a Receiver made as a mere matter of course!

It will be noted that even if no possible harm could come from such an action it nevertheless could not be justified.

"The appointment of a receiver will never be made merely because the measure will do no harm. Nor, *a fortiori*, will a receiver be appointed where no perceptible benefit would result therefrom, and no apparent injury from a refusal to appoint."

23 *Am. & Eng. Encyc.*, 1038-9.

But in the case at bar it is not conceivable that no harm can result. When a going concern of the proportions of appellant corporation is thrown into the hands of a Receiver harm inevitably results.

It is further to be noted that it is a general rule that:

"The reluctance of the courts to appoint a receiver is particularly emphasized where such measure would constitute an interference . . . with the possession of a party under apparent claim of right, and *such reluctance may be increased where the defendant's possession had been long continued.*"

23 *Am. & Eng. Encyc.*, 1039.

If a court will ever feel reluctant to make such appointment where the defendant's possession has been long continued, we very respectfully, but very emphatically, urge that the case at bar is pre-eminently

one of that character. The appellant corporation was organized in 1909, owned and operated its patented lands for oil, and did not enter into a contract to purchase the land in controversy for several years thereafter. It had been so operating its properties for several years when in July, 1913, it entered into possession under a contract with the other appellants. It has expended \$700,000.00 in the development and improvement of the property. Its predecessors had expended \$200,000.00, and appellant corporation has paid \$500,000.00 on account of the purchase price of these lands. These facts all appear in the record at pages 70 to 81 inclusive.

There is no suggestion or claim that the corporation is insolvent or could not upon an ultimate accounting properly respond to any just claims of the Government for oil extracted *pendente lite*.

The following very significant statements in the affidavit of Mr. Titus are before the Court and there is no attempt at contradiction:

"That the occupation of the said Section 2 by the said North American Oil Consolidated and its predecessors in interest were and have been at all times open, notorious and were at all times actually known to the Land Department of the United States Government and that whatever activities in the way of development and improvement of the said property have taken place were with the full knowledge of the officers and agents of the Land Department of the United States. That during all of the said period of time the said North American Oil Consolidated has given to the agents of the Land Department free access to its books and records of all kinds and the said United States Government has at all times during the said period had actual reports and knowledge of the improvements

that the said corporation was making upon said property, and has had access to the books and papers of said corporation showing the amount of oil that it had extracted and was extracting, and showing the contractual obligations which said corporation was under in the matter of its equipment and the disposition of its oil supply.

"That during all of the said time the plaintiff through the officers and agents of its Land Department has had actual knowledge that the defendant, North American Oil Consolidated, was in possession of the said property under a claim of right, and it has during all of said period of time and until the filing of this suit stood by and knowingly permitted the said defendant corporation, without objection, to make the aforesaid expenditures of money and to extract oils from said properties and to incur obligations in and about the development of said property, and to develop the said property to its present condition and to extract therefrom the very oil the value of which it is here seeking to recover."

(Tr., pp. 78-9.)

Is it possible that a private individual, who makes no showing that the occupant of the land is insolvent, and who without offering any excuse has stood by during a period of years while nearly one and a half millions of dollars are being expended by the occupant on the property, would be permitted to come into a court of conscience and upon a showing of ultimate right as doubtful as the Government has here made, be permitted to wrest the property from the occupant's custody and possession, especially if the occupant is actively conducting a great business thereon? We respectfully submit that it simply is not conceivable.

Giving to the decisions which sanction the appointment of a Receiver to restrain waste *pendente lite* their widest scope, they never have gone so far as to

justify a conclusion that if the right of the plaintiff is not absolutely clear, he will nevertheless be entitled to a Receiver for the purpose of preventing waste, notwithstanding the fact that he may have stood by through a period of years and have knowingly permitted the claimant in possession to do the very acts which he now seeks to prevent the continuance of, by placing the property in the hands of a receiver.

The same view is that if the plaintiff makes no proof that the occupant is insolvent and if he has already waited and watched the operations for several years, he can afford to wait a little longer until judgment is rendered in the suit.

In a recent decision already referred to it is said:

“Where there is a serious controversy as to the title, and the party in possession is holding adversely, the plaintiff’s remedy is at law, and not in equity. *Johnston v. Corson Gold Mining Co.*, 157 Fed., 145, 84 C. C. A., 593, 15 L. R. A. (N. S.), 1078. For ‘suits in equity shall not be sustained in the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.’ R. S., §723. *But where the title and right to possession is clear, and the defendant is wrongfully in possession, extracting and removing the mineral contents, thus destroying the very substance of the estate, a court of equity will assume jurisdiction to prevent such waste, and, having done so, will determine the rights of the parties before it.*”

United States v. Midway Northern Oil Co.,
232 Fed. Rep., 619, 628.

The foregoing quotation is an expression indicative of the utmost extent to which the authorities go.

We ask in view of the considerations set forth in the foregoing pages that the order appointing a Receiver be reversed and set aside.

Respectfully submitted.

A. L. WEIL,
U. T. CLOTFELTER,
CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Appellants.

CHARLES S. WHEELER,
Of Counsel.

No. 2789

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

NORTH AMERICAN OIL CONSOL	}
IDATED, et al.,	
Appellants,	
VS.	
UNITED STATES OF AMERICA,	}
Appellee.	

**BRIEF AND ARGUMENT FOR
APPELLEE.**

E. J. JUSTICE,
FRANK HALL,
JAMES W. WITTEN
Attorneys for Appellee

Filed

OCT 17 1916

F. D. Monckton

Filed this.....day of October, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 2789

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

NORTH AMERICAN OIL CONSOL- IDATED, et al.,	<i>Appellants,</i>
vs.	
UNITED STATES OF AMERICA,	<i>Appellee.</i>

**BRIEF AND ARGUMENT FOR
APPELLEE.**

The issues presented by this appeal are practically identical with some of the issues presented by the appeals in the two cases each entitled Consolidated Mutual Oil Co. et al. vs. United States, Nos. 2787 and 2788, now pending before this Court; and in view of the facts that all three of these appeals are set for hearing on the same date, and that the decision of the Court in the cases last mentioned will be decisive of this appeal, the arguments presented in the briefs for appellee in cases Nos. 2787 and 2788 will not be repeated in this brief.

Statement of Case

The appellants, defendants below, were in possession of and claiming a right to all of Section 2, Township 32 South, Range 23 East, M. D. M., under certain pretended placer mining locations, and at the time this suit was brought had drilled a large number of wells thereon from which they had extracted, and were extracting and converting to their own use, large quantities of oil and gas.

The appellee, plaintiff below, claiming ownership and right of possession of said lands and all minerals therein, instituted and is now prosecuting these actions in equity in District Court of the United States for the Southern District of California for the purposes of removing the cloud cast upon its title by the claims of the appellants; to recover both the possession of the land and the value of the oil extracted therefrom; to enforce its general governmental policy with respect to the conservation, use and disposal of its public oil-bearing lands, and the oil therein; to prevent waste; for an accounting for and the recovery of the value of the oil taken and converted by the appellants; for *injunctions restraining appellants from further trespassing and removing oil, and for the appointment of a receiver* to take charge of the property involved.

This is an appeal from the order of the trial court appointing a receiver and restraining appellants from taking oil from the land pending final action

in this cause, and the only questions presented and argued in the brief filed on behalf of appellants are involved in their third and fourth assignments of error.

Effect of Withdrawal Order and Pickett Act

In their third assignment of error the appellants say that the trial court erred in appointing a receiver for the reason that the lands in question were not, under the terms of the withdrawal order of September 27, 1909, affected by that order, and by their fourth assignment of error it is contended that the Court erred in appointing a receiver for the reason that under the facts of this case the appellants were protected by the provisions of the Act of June 25, 1910, commonly known as the Pickett Act.

Statement of Facts

In support of its motion for the appointment of a receiver and the issuance of an injunction, the appellee offered in evidence its verified bill of complaint (Tr. p. 4), which is in all essential particulars the same as the bills of complaint in cases Nos. 2787 and 2788 above mentioned, and also practically the same as the bill of complaint sustained by this Court in the case of *El Dora Oil Co. vs. United States*, 229 Fed. 946.

The verified bill of complaint shows, among other things, that the appellee is the owner of and en-

titled to the possession of the lands in dispute; that the lands were on September 27, 1909, withdrawn by the President from all forms of occupation or appropriation under the mineral land laws of the United States; that the appellants long after September 27, 1909, went upon, and were at the time this suit was commenced, and for a long time prior thereto, trespassing upon and extracting and converting large quantities of oil and gas from said land to the great and irreparable injury thereof.

Affidavits (Tr. pp. 49-89) were offered in evidence by both the appellee and the appellants at the hearing under the motion for the appointment of a receiver from which it appears that each of the four quarters of the section of land involved in this action was embraced in a pretended placer mining location made prior to 1909; that no work was done by these defendants or any other person under and through whom they claim on either of the tracts prior to June 21, 1909, and no oil or other minerals were discovered thereon until long after March 1, 1911; that between June 21, 1909, and September 27, 1909, a standard drilling rig, including a derrick, and an engine house, and a belt house, and also a cabin or bunk house were erected on each of the quarter sections; that on June 21, 1906, two boilers for use in drilling wells were purchased and later placed near the center of the section in such a position that they could be used for drilling wells upon each of the four tracts. A well was drilled for water but no water was found.

The exact dates on which these improvements or any of them were made is not shown, but it is evident that they were completed long before September 27, 1909, because affiant Strassburger, who was manager of the Pioneer Midway Oil Company, by which the improvements were made, says in one of his affidavits in evidence (Tr. p. 61) that he “directed that a camp be established upon said section for the purpose of drilling wells upon each of the quarter sections thereof, shortly prior to the 21st day of June, 1909, and on said 21st day of June, 1909, received a report from the superintendent of said property wherein the said superintendent stated: ‘I will establish a camp down on Section 2 as soon as possible and will commence the erection of those boilers’.”

This statement, when coupled with the statement of affiant Tryon (Tr. p. 56), an experienced derrick builder, that derricks such as those mentioned “can, under ordinary circumstances, be erected in about ten days’ time”, seems to warrant the conclusion that the improvements were completed soon after June 21, 1909; and the conclusion that they were completed some time prior to September 27, 1909, finds justification in the fact that defendants who furnish these affidavits in support of their claim have wholly failed to give the exact dates the improvements were completed, facts which could probably have been easily ascertained from the Pioneer Midway Oil Company, by whom the improvements were made.

The only attempt made to show that defendants' predecessors in interest were, either on or after September 27, 1909, the date of the withdrawal, in the diligent prosecution of work leading to discovery of oil or gas on any of the tracts involved is the statement quoted from the affidavit of affiant Strassburger (Tr. p. 63) as follows:

“That employees of the said corporation were in actual physical possession of each of the four quarters of the said Section 2 and were actually living and laboring thereon on said 27th day of September, 1909; that on or about the said 27th day of September, 1909, the said employees were performing labor in clearing brush and leveling ground for the construction of the proposed drilling plants of the said corporation and that the said work of brushing out was done upon each of the said four quarters of said section respectively.”

In view of the fact that the improvements mentioned above had all been completed before that date the necessity for the clearing away of brush is not very obvious.

It is not shown that any work of any kind was done on either of the tracts between September 27, 1909, and the spring of 1910, when the Pioneer Midway Oil Company transferred its claims to other persons who went into possession and, after doing the necessary preliminary work, drilled for oil on the several quarter sections as follows: On the Southeast quarter after April 15, 1910, to a depth of 460 feet; on the Southwest quarter from June 20, 1910, to July 17, 1910, to a depth of 665 feet; on

the Northwest quarter from July 25, 1910, to August 22, 1910, to a depth of 620 feet; and on the Northeast quarter from September 15, 1910, to September 22, 1910, to a depth of 586 feet. After the wells on these several quarter sections had been drilled to the depths above mentioned no further drilling was done until after March 1, 1911.

The appellants urge that a lack of available water prevented the drilling of wells any earlier than at the date given above.

It is submitted that under these facts the contentions of the appellant cannot be sustained and that for the reasons given in the brief filed in cases Nos. 2787 and 2788 the action of the trial court should be affirmed.

E. Justice

Frank Hall

Gas W. Witten

Attorneys for Appellee.

No. 2789.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

NORTH AMERICAN OIL CONSOLIDATED, a Corporation,
WALTER P. FRICK, JOHN F. CARLSTON,
CLARENCE J. BERRY, DENNIS SEARLES, WALTER
H. LEIMERT, and WICKHAM HAVENS,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

SUPPLEMENTAL BRIEF

ADDRESSED TO THE POINT THAT APPELLANTS ARE
ENTITLED TO A PATENT UNDER THE ACT
OF MARCH 2, 1911

A. L. WEIL,
U. T. CLOTFELTER,
CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Appellants.

CHARLES S. WHEELER,
Of Counsel.

Filed this.....day of January, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.
San Francisco

Filed

FEB 23 1917

F. D. Monckton,

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

NORTH AMERICAN OIL CON-
SOLIDATED, a Corporation, WAL-
TER P. FRICK, JOHN F. CARL-
STON, CLARENCE J. BERRY,
DENNIS SEARLES, WALTER H.
LEIMERT, and WICKHAM HA-
VENS,

Appellants,

VS.

THE UNITED STATES OF AMER-
ICA,

Appellee.

No. 2789.

APPELLANTS ARE ENTITLED TO A PATENT UNDER THE
ACT OF MARCH 2, 1911, REGARDLESS OF ALL QUES-
TIONS AS TO THEIR DILIGENCE OR THAT OF THEIR
PREDECESSORS.

The proposition which this Supplemental Brief is intended
to present, may be stated in syllabus as follows:

1. In cases where the holder of a *bona fide* claim has actu-
ally discovered oil within a withdrawn area, the Act of Con-
gress passed March 2, 1911, entitles such holder to a patent,
“*provided that at the time of inception of development under
the claim,*” the land was not withdrawn from mineral entry.

2. In the class of cases to which said Act applies, it dispenses with the requirements of the Pickett Act which call for "diligent prosecution of work leading to discovery."

3. The Pickett Act defines the terms upon which, prior to discovery, a claimant is permitted to continue his efforts to discover oil or gas within a withdrawn area. The Act of March 2, 1911, on the other hand, defines a claimant's rights after he has in good faith gone ahead and actually made a discovery. Under the latter Act it is too late for the government to raise any question as to a claimant's diligence where it appears that such claimant initiated development on the claim prior to the order of withdrawal, and thereafter went ahead and accomplished an actual discovery.

**THE SAID ACT OF MARCH 2, 1911, SHOULD BE READ IN
CONNECTION WITH ITS TITLE.**

The title of an Act of Congress is ordinarily no part of the Act itself. But it is well settled that if the words of such Act are doubtful or ambiguous, the title may be looked to for the purpose of resolving such doubt or ambiguity.

"The title is no part of an act and cannot enlarge or confer powers, or control the words of the act *unless they are doubtful or ambiguous.*"

U. S. v. Oregon, etc. R. R., 164 U. S., 526, 541.

See also:

U. S. v. Fisher, 2 Cranch, 385, 386;

In re Boston M. & M. Co., 51 Cal., 624, 625.

The ambiguities in the text of the Act of March 2, 1911, are such that until the title of the Act is looked to, it is not easy to grasp its full meaning.

However, the intent of Congress becomes entirely clear when the Act is considered in connection with its title.

The said Act, with appropriate references to its title inserted by us in parentheses, reads as follows:

"An Act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in no case (*where the locators are bona fide and they or their successors shall have effected an actual discovery of oil or gas*) shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified persons or person, or corporation, prior to discovery of oil or gas therein, but if such claim (*of such bona fide locators or their successors who shall have effected an actual discovery of oil or gas*) is in all other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases; **provided, however, That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry.**"

36 St. L., 1015.

An analysis of the foregoing Act will satisfy the Court that its correct meaning is this:

If public land was open to location; and

If a *bona fide* locator had duly made a paper location thereon prior to the passage of the Act; and

If such locator or his successor in interest initiated development under such paper location; and

If at the time of the inception of such development

the land had not been withdrawn from mineral entry; and

If the locator or his successor in interest has gone ahead and made an actual discovery of oil or gas;

Then, when patent is applied for, the fact that an assignment or transfer of the claim or of some interest therein may have been made prior to the discovery of oil or gas, will not justify the Land Department in refusing a patent if the claim is in all other respects valid and regular; nor shall such patent be refused because of the fact that an order of withdrawal may have been made after the inception of development and prior to such discovery. But patent shall issue in these cases as in other cases, with the usual restrictions as to the maximum acreage in any one claim.

THE PURPOSE OF THE ACT WAS TWOFOLD.

In two ways this Act of March 2, 1911, was intended to "protect the locators in good faith of oil and gas land who shall have effected an actual discovery."

First: It validates all transfers which had been made prior to discovery—thus granting relief against the so-called *Yard* decision of the Land Department which had held such transfers void; and

Second: It allows patents to all *bona fide* locators who had initiated development on their claims prior

to a withdrawal and who had gone ahead thereafter and effected an actual discovery.

The so-called Yard decision (38 L. D., 59) had then recently been extended by the Land Department to oil claims. (*Bakersfield Fuel & Oil Co.*, 39 L. D., 460, Jan. 19, 1911.) In said decision the Land Department held that prior to discovery of oil or gas a locator had no right which he could assign or transfer. Nearly every oil well in the country had been drilled to discovery either by lessees or grantees of the original locators or some of them. The Yard decision invalidated all such transfers, and the situation called for legislation which would render such transfers valid.

But there was also another situation which called quite as loudly for relief. The Pickett Act left the titles to oil claims within the withdrawn areas in a deplorable situation. If the occupant or claimant was at the date of a withdrawal order "in diligent prosecution of work leading to discovery of oil or gas," the Act declared that his "rights" should not be "affected or impaired" by such order, "so long as he shall continue in diligent prosecution of said work."

But what, under the Pickett Act, would amount to a "diligent prosecution of work leading to discovery of oil or gas"? And what would constitute the continuance of diligence such as the Act called for? These were open questions.

The answer to these questions rested wholly in parol. The claimant had no definite criterion to go by. He must decide for himself whether or not his own diligence at the date of the order justified his further expenditures in the search for oil. Intending purchasers of the claim prior to discovery must likewise pass upon the question of the occupant's diligence for themselves. And even when discovery was made, that did not settle the matter; for under the Pickett Act the owner might still be denied a patent for alleged lack of original or continued diligence. A purchaser of a highly developed producing property, however firmly convinced that there had been proper diligence both at and after the date of the withdrawal order, was still in a situation to have his title taken from him and patent refused because the degree of diligence employed at and after a withdrawal order might not conform to the ideas of someone in the Land Office.

When once the occupant of a claim upon which development had been initiated in good faith prior to a withdrawal order, had gone ahead in good faith—without any interference whatever from the government—and had effected an actual discovery, it was eminently just and proper that the degree of the occupants' diligence at the date of the order of withdrawal or of his continued diligence during a particular period thereafter should be no longer open to inquiry.

The Act was intended to meet this situation quite as much as it was intended to correct the hardships produced by the Yard decision.

THE HISTORY OF THE ACT SHOWS THIS TO BE THE
CONSTRUCTION INTENDED BY CONGRESS.

Not only the title of the Act but the history of the Act as well, emphasizes the fact that Congress intended that the inception of development prior to a withdrawal, when followed by actual discovery, should be the test of the claimant's right to a patent.

As originally passed by the House the proviso in the bill was much broader than in its final form. It then read as follows:

"Provided, however, That such lands were not at the time of *entry into possession thereof* covered by any withdrawal."

C. R. (House). Vol. 46, part 2, p. 1965;

C. R. (House) Vol. 46, part 3, p. 2097.

The bill reached the Senate on February 8, 1911, and was referred to the Committee on Public Lands (Cong. Rec., Senate, Vol. 46, pt. 3, p. 21). In said Committee the bill was amended after an interchange of views with the Secretary of the Interior. The communications from the Secretary of the Interior accompany the report of said Committee (See Report No. 1179, Cong. Rec., Senate, Vol. 46, part 3, p. 2641).

It appears from said record that in the Senate Com-

mittee on Public Lands, it was first proposed to amend the proviso in the Bill as it passed the House so that the same should read as follows:

“Provided, however, That such lands were not at the time of *the inception of such claim and of development thereon or thereunder* withdrawn from mineral entry.”

This intended amendment was communicated to the Secretary of the Interior for an expression of the views of his Department. Under date of February 9, 1911, he replied as follows (*italics ours*):

“The proviso, ‘provided, however, That such lands were not *at the time of the inception of such claim and of development thereon or thereunder* withdrawn from mineral entry,’ is believed to have all the force intended to be given to the proviso in the bill as passed by the House.”

“The suggested wording of the proviso also recognizes the inception both of the claim and of the development thereunder as essential elements in the inauguration of an equity by the oil land locator, and, it is believed, fully insures the bona fides of the claimant seeking relief under this legislation.

“The bill in this form has the approval of the department, and I repeat my expressions of conviction contained in my letter of January 16, addressed to your Committee, that *the remedial measure is both needed and deserved*, with the recommendation that the bill be enacted into law.

“Very respectfully,

“R. A. BALLINGER,
“Secretary.”

After the receipt of the foregoing letter a suggestion was evidently made in the Committee that the

proviso be further amended to read in its present form, viz:

"Provided, however, That such lands were not *at the time of the inception of development* on or under such claim, withdrawn from mineral entry."

This proposed change was communicated to the Secretary of the Interior by Senator Flint. This was answered by the following letter from Secretary Ballinger to Senator Flint:

"THE SECRETARY OF THE INTERIOR.

"Washington, February 14, 1911.

"My dear Senator:

"Replying to your letter of February 14, 1911, submitting a proposed amendment to the proviso to H. R. 32344, as follows:

"'Provided, however, That such lands were not at the time of the inception of development on or under such claim, withdrawn from mineral entry.'

"I have the honor to advise you that in my opinion the proposed amended proviso will effect the same end contemplated by the original proviso, and I have no objection to offer to the suggested change, **which emphasizes the fact that there must have been development initiated upon the claims prior to the withdrawal in order that they shall have the benefit of the provisions of the Act.**

"Very respectfully,

"R. A. BALLINGER,

"Secretary.

"Hon. Frank P. Flint,

"United States Senate."

The language of the foregoing letter indicates unmistakably the understanding not only of the Secretary of the Interior as to the scope of the Act, but it also shows that Congress had the same understanding when it passed the Act; for the *proviso* in the form

thus approved and interpreted by Secretary Ballinger was adopted by the Senate upon the report of the Committee on Public Lands *which set forth the said letter of Secretary Ballinger* (Cong. Rec., Senate, Vol. 46, part 3, p. 2641; also Vol. 46, part 4, p. 3410). On February 27, 1911, the House concurred in the Senate amendment (Cong. Rec., House, Vol. 46, part 4, p. 3618).

THE PARTICULARS IN WHICH THE ACT OF MARCH 2,
1911, ENLARGED THE PICKETT ACT.

The said Act of March 2, 1911, should be read in connection with the Pickett Act of June 25, 1909. The Pickett Act—it will be noted—merely preserves the “rights” of a *bona fide* locator or claimant who was engaged in diligent prosecution of work leading to discovery at the date of any withdrawal order. It further declares that such “rights” shall not be “impaired” or “affected” by such withdrawal order so long as the occupant or claimant shall continue in such diligent prosecution of work.

Thus the Pickett Act is essentially an Act which permits the occupant or claimant who was duly diligent at the date of withdrawal to remain in possession and make a discovery if he can. And though unsuccessful in his first efforts, nevertheless if he is diligent, he may continue to go ahead for years and years in his quest until he makes a discovery or voluntarily abandons his efforts.

What happens when he makes a discovery, the Pickett Act does not expressly state; but since the Act declares that the "rights" of the diligent *bona fide* occupant or claimant shall not be "affected or impaired," it is clear, we take it, that after discovering oil, he may take the oil, work his claim, sink more wells, and apply for a patent at his pleasure, just as if no order of withdrawal had ever been made. His "rights" in this regard are not "affected or impaired" by the order of withdrawal, as we understand the Pickett Act.

But the difficulty with the Pickett Act is that in such a case a claimant is compelled at his peril to pass upon the question of due diligence. He must reach his own conclusion as to whether or not the facts bring his case within the protection of the Pickett Act. His troubles are not over when in good faith and after investigation he has reached the conclusion that he (or his predecessors, as the case may be) was using the degree of diligence called for by said Pickett Act at the date of a withdrawal order. After reaching that conclusion he goes ahead and uses what he believes to be the continued diligence called for by the said Act, and he spends perhaps hundreds of thousands of dollars in the belief that his claim is good; but when he applies for a patent, the Land Department meets him with two objections, viz:

1. That he has erred in concluding that due dili-

gence was being employed on the claim at the date of the withdrawal order; and

2. That he was likewise in error in believing that the diligence employed in the development work on the property after the order of withdrawal was sufficiently continuous to meet the demands of the Pickett Act.

Each case must stand on its own bottom on the question of diligence and the Land Department is as likely to be in error as the claimant in applying the law to the facts. But on either of the two grounds above noted, if the Pickett Act were the sole measure of the claimant's rights, a patent might be refused regardless of the claimant's absolute good faith and of his heavy outlays, and regardless, also, of the fact that he has actually proceeded without interference from the government until he has made a discovery of oil or gas.

The case at bar affords a good example of what such a situation leads to; for not only was a discovery actually made in due course upon every claim, but it appears that three-quarters of a million dollars was expended in absolute good faith in developing the property.

And yet under the Pickett Act, the whole case hinges upon what under the circumstances must be characterized as an absurd technical question, viz: Whether a claimant can be said to have been in

diligent pursuit of work leading to a discovery at a given date when much against his will his drilling operations were delayed for a few months, owing solely to the physical impossibility of getting a water supply sooner. Here there is no question but that there was a *bona fide* inception of development prior to the withdrawal order. No question of good faith is involved. No moral issue is presented. And yet upon the answer to a technical question—a question to which one mind may answer “yes” and another “no,”—the reward which morally should attend the toil and the risks and the enormous outlays of Appellants, are made to swing in the balance.

Such a situation naturally called for remedial legislation. This relief the Act of March 2, 1911, was intended to afford. Under this remedial Act the locators must be *bona fide* locators—not “dummies.” The inception of development must have antedated the order of withdrawal. But there need not have been—as under the Pickett Act—a diligent pursuit of work leading to a discovery of oil or gas at the very date of the withdrawal order; nor is there any requirement, as in the Pickett Act, that the diligent prosecution of work leading to discovery must be continuous down to the moment of discovery. This later Act declares in effect, that where there has been an actual discovery of oil or gas no technical questions regarding the sufficiency of the work performed to

constitute due diligence at or after the passage of the Pickett Act, are of any consequence; but that when once a discovery has been made, then if it be also shown *that the development of the claim was initiated prior to the withdrawal order*, the claimant's right to patent (if his claim is regular and valid in other particulars) is complete.

APPLICATION OF THE ACT OF MARCH 2, 1911, TO THE
CASE AT BAR.

In the case at bar the "inception of development" on each claim preceded the order of withdrawal of September 27, 1909, by several months; for as early as June, 1909, standard derricks with rig irons complete, together with dwelling houses for the drilling crews, were erected on the property. After this a delay of several months followed, owing solely to the fact that the claimants were unable to get water. A discovery was made on each of the four claims after said withdrawal order was made, but long before this suit was brought. The case therefore falls directly within the protection of said Act of March 2, 1911, and since the regularity of appellant's claims is not otherwise questioned, appellants have under said Act a vested right to a patent regardless of any questions as to their own diligence or that of their predecessors

intermediate the inception of development and the date of discovery.

Respectfully submitted.

A. L. WEIL,
 U. T. CLOTFELTER,
 CHARLES S. WHEELER and
 JOHN F. BOWIE,
 Attorneys for Appellants.

CHARLES S. WHEELER,
 Of Counsel.

No. 2793

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE D. PARKER,

Appellant,

VS.

FRED STEBLER,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

Filed

MAY 25 1918

J. D. Monckton,

Clerk

No. 2793

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE D. PARKER,

Appellant,

vs.

FRED STEBLER,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF
RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Attorneys, Names and Addresses of.....	1
Bond on Appeal.....	16
Certificate of Clerk, U. S. District Court to Transcript of Record.....	20
Citation on Appeal.....	1
Decree of Dismissal.....	7
Minutes of Court—November 29, 1915.....	6
Motion to Dismiss.....	3
Names and Addresses of Attorneys.....	1
Order Alloying Appeal and Fixing Amount of Bond... ..	15
Order Enlarging Time to File Record and Docket Cause to April 29, 1916.....	23
Order Enlarging Time to File Record and Docket Cause to July 1, 1916.....	24
Petition for Order Allowing Appeal.....	12
Praecipe for Transcript of Record.....	19
Statement of Proceedings.....	9
Stipulation re Statement of Proceedings, etc...	11

Names and Addresses of Attorneys.

For Appellant:

N. A. ACKER, Esq., Foxcroft Building, 68 Post
Street, San Francisco, California.

For Appellee:

FREDERICK S. LYON, Esq., 504-7 Merchants
Trust Building, Los Angeles, California.

[3*]

Citation [on Appeal].

UNITED STATES OF AMERICA,—ss.

The President of the United States to Fred Stebler,
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal entered and of record in the clerk's office of the United States District Court for the Southern District of California, Southern Division, in suit in Equity No. A-90 therein, and wherein you are the complainant and appellee and George D. Parker is defendant and appellant, to show cause, if any there be, why the decree of said Court made and entered therein dismissing plaintiff's Bill of Complaint and adjudging that you recover of said appellant and defendant the sum of \$39.00, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

*Page-number appearing at foot of page of original certified Record.

WITNESS the Honorable OSCAR A. TRIPPET,
United States District Judge for the Southern Dis-
trict of California, Southern Division, this 21st day
of January, 1916.

OSCAR A. TRIPPET,
United States District Judge.

Due service of a copy of the above Citation is
hereby acknowledged this 21st day of January,
1916.

FREDERICK S. LYON,
Solicitor for Complainant and Appellee. [4]

[Endorsed]: No. A-90—Eq. U. S. District
Court, Southern District of California. Fred Steb-
ler, Complainant and Appellee, v. George D. Parker,
Defendant and Appellant. Citation. Filed Feb. 4,
1916. Wm. M. Van Dyke, Clerk. By Chas. N.
Williams, Deputy Clerk. [5]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. A-90—EQUITY.

FRED STEBLER,

Complainant,

vs.

GEORGE D. PARKER,

Defendant. [6]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—No. A-44.

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS EXCHANGE,

Defendant,

AND

FRED STEBLER,

Complainant,

vs.

SUNDRY DEFEND-
ANTS.

In Cases Nos. A-43, 45, 49, 50, 51,
52, 53, 54, 55, 56,
57, 58, 62, 63, 64,
65, 66, 67, 70, 71,
73, 74, 75, 76, 77,
78, 86, 90, A-8
No. Division and
Cir. Ct. No. 1675.

Motion to Dismiss.

To the Honorable, the Judges of the Above-entitled
Court:

Come now the defendants to the above-mentioned
suits pending in this court, and through their at-
torney, N. A. Acker, Esq., move this Honorable
Court that an order be granted dismissing each and
every of the above-mentioned suits, with costs to
the defendants.

The grounds assigned for said motion and the
granting of an order for dismissal with costs to the
defendants are:

1. That the above-entitled suits are for the in-
fringement [7] of Re-issue Letters Patent No.
12,297, particularly claims 1 and 10 thereof, by the
use of Fruit Grading Machines, involved in Equity

suit No. 1562, entitled Fred Stebler vs. Riverside Heights Orange Growers Association and George D. Parker.

2. That all of the machines involved in the above-mentioned suits for infringement of said letters patent are machines which were purchased from George D. Parker, one of the defendants to Equity suit No. 1562, pending in this court and entitled Fred Stebler vs. Riverside Heights Orange Growers Association and George D. Parker, the said George D. Parker being the manufacturer and seller of the said alleged infringing machines.

3. That an accounting and final decree have been had in said Equity suit No. 1562 and under the said accounting therein the said George D. Parker accounted for each and every of the Fruit Graders involved in each of the above-mentioned suits for infringement, pending against these defendants herein.

4. That under said accounting full damages and profits for each and every of the said infringing machines manufactured and sold by the said George D. Parker to the defendant users herein were awarded unto the said Fred Stebler, complainant, to said Equity suit No. 1562 and complainant to each of the above-entitled [8] suits, and the judgment for said damages and profits has been satisfied by the said George D. Parker, in said suit No. 1562, and satisfaction entered of record.

5. That under the decision of this Court, rendered by his Honor, Olin Wellborn, and entered Feby. 18, 1914, *re* Equity suit No. 1562, the satis-

faction of judgment awarded against defendants to said Equity suit No. 1562 releases the infringing machines involved herein and gives unto the users, the defendants herein, free right to the use of said machines without payment of further tribute to the patent monopoly or to the owner of the letters patent, the complainant herein.

6. That said decision of his Honor, Olin Wellborn, on an appeal taken to the United States Circuit Court of Appeals for the Ninth Circuit from the order granted under and in conformity with such decision, was sustained by the said United States Circuit Court for the Ninth Circuit, as more fully appears in the decision of said Court, 214 Fed. Rep. 550.

7. That no necessity, legal or otherwise, existed prior to the accounting against the defendants to said Equity suit No. 1562 for the institution of suit against the defendants to the above-mentioned pending suits, which defendants comprised mere users of the infringing [9] machines manufactured and sold by the said George D. Parker—one of the defendants to Equity suit No. 1562.

8. That no machine is involved in any of the above-mentioned suits which has not been accounted for by the said George D. Parker and included in the judgment of this Court for damages and profits, which judgment, as above stated, has been satisfied by the said George D. Parker.

Wherefore an order for the dismissal of each and every of the above-mentioned suits with costs to the

defendants is prayed for.

Respectfully submitted,

N. A. ACKER,

Solicitor for Defendants.

San Francisco, California, November 13, 1915.

[Endorsed]: No. A-44 U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Pomona Fruit Growers Exchange, and Sundry Defendants. Motion to Dismiss. Filed Nov. 15, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, Attorney at law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendants. [10]

[Minutes of Court—Nov. 29, 1915.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-ninth day of November, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. A-90—EQUITY.

FRED STEBLER,

Complainant,

vs.

GEORGE D. PARKER,

Defendant.

This cause having come on this day to be heard on defendant's motion that this suit, together with other suits by the same complainant against various defendants, be dismissed, with costs to the defendants in said suits; Frederick S. Lyon, Esq., appearing as counsel for complainant; N. A. Acker, Esq., appearing as counsel for defendant; and this cause having been submitted to the Court for its consideration and decision on said motion and on the argument of a similar motion in cause No. A-44—Equity, Fred Stebler, Complainant, vs. Pomona Fruit Growers Exchange, Defendant; it is by the Court ordered that defendant's said motion to dismiss this suit with costs against the complainant be, and the same hereby is denied, and it is further ordered by the Court, on motion of Frederick S. Lyon, Esq., of counsel for complainant, that the Bill of Complaint herein be dismissed, with costs against defendant, a decree accordingly to be prepared and submitted by counsel for complainant. [11]

[Decree of Dismissal.]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—No. A-90.

FRED STEBLER,

Complainant,

vs.

GEORGE D. PARKER,

Defendant.

It is hereby ordered, adjudged and decreed that complainant's Bill of Complaint in the above-entitled suit be and the same is hereby dismissed and that complainant recover of and have judgment against defendant for the sum of thirty nine & 00/100 dollars, complainant's costs and disbursements herein.

OSCAR A. TRIPPET,
District Judge.

Dated Los Angeles, Cal., December 6, 1915.

Decree entered and recorded. Dec. 6, 1915.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of
California.

By Leslie S. Colyer,
Deputy.

[Endorsed]: No. A-90—Eq. United States District Court, Southern District of California, Southern Division. Fred Stebler vs. Geo. D. Parker. Decree. Filed Dec. 6, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants Trust Building, Los Angeles, Cal. [12]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. A-90.

FRED STEBLER,

Complainant,

vs.

GEORGE D. PARKER,

Defendant.

Statement of Proceedings.

For the purpose of an appeal on behalf of the foregoing defendant to the United States Circuit Court of Appeals for the Ninth Circuit, the following constitutes in narrative form a statement of all of the proceedings had and taken relative to the above-entitled suit in the United States District for the Southern District of California, Southern Division:

This statement of proceedings is supplemental to the statement of proceedings in suit Number A-44 in this court wherein Fred Stebler is complainant and Pomona Fruit Growers Exchange is defendant and the appeals in these two cases are to be heard together; the following additional facts to be considered in connection with this appeal:

After the entry of the interlocutory decree in said case number 1562 on November 5th, 1913, the defendant, George D. Parker, commenced the manufacture and installation of certain other fruit grading and distributing apparatus, complainant, Fred Stebler, then filed his appeal in equity in [13] this suit number A-90, alleging the grant, issuance and delivery of two patents other and distinct from the patent sued on in this suit number 1562; after the commencement of such suit and after defendant had filed his answer therein and while motion for temporary injunction was pending therein defendant modified the construction of such machines to avoid the charge of infringement of the two patents sued on herein; upon the accounting in 1562 such

modified machines were held by the Master to be an infringement of said re-issue letters patent number 12,297 and the profits and damages accruing from such infringement by reason of said modified machines were included in said accounting and in said judgment for profits and damages so referred to in the "Statement of Proceedings" in case A-44; that of such modified machines there were a number and at the time of bringing this suit A-90 the complainant also brought suit for injunction, etc., on account of the infringement of said other patents against sundry other defendants in cases number A-58, A-62, A-63, A-92, A-96, A-97, A-98, and A-55, the defendants therein being users of such new type machines which were so modified after the bringing of the suits and after the bringing of motions for temporary injunctions as to avoid infringements of said other patents, but were held as modified to be infringements of said re-issue letters patent number 12,297 and were accounted for and damages and profits awarded complainant in said judgment in suit 1562 and included in the judgment referred to in said "Statement of Proceedings" in suit A-44.

That at the same time that the motions to dismiss suit A-44 and the companion suits referred to in the "Statement [14] of Proceedings" in case number A-44 were heard in this court complainant moved to dismiss this suit A-90 and its companion cases above referred to at the cost and expense of the respective defendants which said motion was granted by this Court and in case number A-90 the

decree of dismissal adjudged that complainant have and recover against defendant the sum of \$39 costs and disbursements and in said companion suits divers amounts.

[Stipulation Re Statement of Proceedings, etc.]

The foregoing is stipulated and approved by the counsel for the respective parties as a statement of all the proceedings had or taken in this court in connection with the motion for dismissal of said suit and an agreed record upon which the said appeal of the defendant Pomona Fruit Growers Exchange shall be heard in the United States Circuit Court of Appeals for the Ninth Circuit from said judgment for costs and disbursements.

FREDERICK S. LYON,
Attorney for Complainant.

N. A. ACKER,
Attorney for Defendant.

[Endorsed]: No. A-90. United States District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. George D. Parker, Defendant. In Equity. Statement of Proceedings. Filed Jan. 26, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

[15]

*In the United States District Court, Southern
District of California, Southern Division.*

IN EQUITY—No. A-90.

FRED STEBLER,

Complainant,

vs.

GEORGE D. PARKER,

Defendant.

Petition for Order Allowing Appeal.

The defendant to the above-entitled suit, conceiving himself aggrieved by the final order and judgment made and entered by said Court in the above-entitled cause, on the 6th day of December, 1915, allowing costs to the complainant, upon the dismissal of the above-entitled suit, on motion of the complainant thereto, comes now, by his counsel, and petitions said Court for an order allowing him to prosecute an appeal from said order and judgment granting and allowing said costs to the complainant, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the sum of security which the defendant shall give and furnish upon such appeal, said security to act as a supersedeas bond, pending the determination of the said appeal by the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

N. A. ACKER,

Solicitor and Counsel for Defendant. [16]

[Endorsed]: In Equity—No. A-90. U. S. District Court, Southern District of California, *Second* Division. Fred Stebler, Plaintiff, vs. George D. Parker, Defendant. Petition for Order Allowing Appeal. Filed Jan. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendant. [17]

In the United States Circuit Court, Southern District of California, Southern Division.

IN EQUITY—No. A-90.

FRED STEBLER,

Complainant,

vs.

GEORGE D. PARKER,

Defendant.

Assignment of Errors.

Comes now the defendant to the above-entitled suit, and specifies and assigns the following as the errors upon which he will rely upon his appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment and order entered in the above-entitled suit on the 6th day of December, 1915, awarding unto plaintiff costs, on the granting of the complainant's motion to dismiss said above-entitled suit.

That said District Court of the United States in and for the Southern District of California, Southern Division, erred as follows:

I.

That the Court erred upon the granting of complainant's motion to dismiss the above-entitled suit, in allowing costs unto the plaintiff.

II.

That the Court erred in not allowing costs to the defendant, upon the dismissal of the bill, upon complainant's motion [18] to dismiss.

III.

That the Court erred in allowing a solicitor's fee of twenty (20) dollars in the above-entitled suit as a part of the costs therein, as taxed by the clerk of said court.

All of which is respectfully submitted.

N. A. ACKER,

Solicitor and Counsel for Defendant.

[Endorsed]: In Equity—No. A-90. U. S. District Court, Southern District of California, *Second* Division. Fred Stebler, Plaintiff, vs. George D. Parker, Defendant. Assignment of Errors. Filed Jan. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendant. [19]

**[Order Allowing Appeal and Fixing Amount of
Bond.]**

*In the United States District Court, Southern Dis-
trict of California, Southern Division.*

IN EQUITY—No. A-90.

FRED STEBLER,

Complainant,

vs.

GEORGE D. PARKER,

Defendant.

Order Allowing an Appeal at a Stated Term, to wit,
the July Term, A. D. 1915, of the United States
District Court, Southern District of California,
Southern Division, held at the courtroom of
the Said Court in the City of Los Angeles,
County of Los Angeles, on the 6th day of Decem-
ber, 1915. Present, Hon. OSCAR A. TRIP-
PET, United States District Judge for the
Southern District of California, Southern Divi-
sion, sitting in Equity.

On motion of Nicholas A. Acker, Esq., solicitor
and of counsel for defendant in the above-entitled
suit;

IT IS ORDERED, that an appeal to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit, as prayed for in the petition for order allowing
appeal from the final judgment and order heretofore
filed and entered, dismissing the above-entitled suit,
on motion of complainant herein, be and the same is
hereby granted.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of Two Hundred and Fifty Dollars (\$250.00) [20] the same to act as a super-sedeas bond, and also as a bond for costs and damages on said appeal, and that on the filing of said bond all proceedings herein be stayed until the determination of the appeal by the said United States Circuit Court of Appeals for the Ninth Circuit.

OSCAR A. TRIPPET,
District Judge.

Dated January 20, 1916.

[Endorsed]: In Equity. No. A-90. U. S. District Court, Southern District of California, *Second Division*. Fred Stebler, Plaintiff, vs. George D. Parker, Defendant. Order. Filed Jan. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal. for Defendant. [21]

United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. A-90.

FRED STEBLER,

Complainant,

vs.

GEORGE D. PARKER,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That the United States Fidelity & Guaranty Com-

pany of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Fred Stebler, plaintiff in the above-entitled suit, in the penal sum of Two Hundred and Fifty Dollars (\$250.00) to be paid to the said Fred Stebler, his heirs, assigns and legal representatives, for which payment, well and truly to be made, the United States Fidelity & Guaranty Company of Maryland, binds itself, its successors, and assigns, firmly by these presents.

Sealed with corporate seal and dated this eleventh day of January, 1916.

The condition of the above obligation is such that whereas the defendant to the above-entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the final order or decree made, rendered and entered on the 6th day of December, 1915, by the District Court of the United States, for the Southern District of California, Southern Division, in the above-entitled suit by [22] the said Court allowing costs to the plaintiff on the granting of plaintiff's motion for a dismissal of said above-entitled suit.

NOW, THEREFORE, the condition of the above obligation is such that if the defendant to the above-entitled suits shall prosecute his said appeal to effect and answer all costs which may be adjudged against him if he fails to make good his appeal, this obligation

shall be void; otherwise to remain in full force and effect.

[Seal]

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

By VAN R. KELSEY,
Its Attorney in Fact.

Approved 1/20/16.

TRIPPET.

State of California,
County of Los Angeles,—ss.

On this 11th day of January, in the year one thousand nine hundred and sixteen, before me, Hallie D. Winebrenner, a notary public in and for said county and State, residing therein, duly commissioned and sworn, personally appeared Van R. Kelsey, known to me to be the duly authorized attorney in fact of The United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the attorney in fact of said company, and the said Van R. Kelsey duly acknowledged to me that he subscribed the name of The United States Fidelity and Guaranty Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed [23] my official seal the day and year in this Certificate first above written.

[Seal] HALLIE D. WINEBRENNER,
Notary Public in and for Los Angeles County, State
of California.

[Endorsed]: In Equity—No. A-90. U. S. District
Court, Southern District of California, Southern

Division. Fred Stebler, Complainant, vs. George D. Parker, Defendant. Bond on Appeal. Filed Jan. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendant. [24]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

Clerk's Office.

IN EQUITY—No. A-90.

FRED STEBLER,

Complainant,

vs.

GEORGE D. PARKER,

Defendant.

Praeceptum [for Transcript of Record].

To the Clerk of said Court:

Sir: Please prepare as a transcript of record on the appeal in this suit by defendant from the final order or decree of the Court, a copy of each of the following, and duly certify the same as the Transcript on Appeal, in accordance with the Equity Rules of the Supreme Court:

1. Motion to Dismiss.

2. Minute Record of the Clerk Relative to the Denial of Defendant's Motion; Motion of Complainant to Dismiss, and the Granting of Complainant's Motion.

3. Final Order or Decree of Court.
4. Petition for Order Allowing Appeal.
5. Assignment of Errors.
6. Order Allowing Appeal.
7. Bond on Appeal for Cost in the Sum of \$250.00.
8. Stipulated Statement of Proceedings.

N. A. ACKER,

Solicitor for Defendant. [25]

Received a copy and acknowledging due service of above Praecipe this 7th day of February, 1916.

FREDERICK S. LYON,

Solr. for Complainant.

[Endorsed]: No. A-90. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, v. George D. Parker. Praecipe for Transcript on Appeal. Filed Feb. 12, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [26]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. A-90—EQ.

FRED STEBLER,

Complainant,

vs.

GEORGE D. PARKER,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing twenty-six (26) typewritten pages, numbered from 1 to 26, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Motion to Dismiss, Minute Order of November 29, 1915, Decree of Dismissal with costs against defendant, Statement of Proceedings, Petition for Order Allowing Appeal, Assignment of Errors, Order Allowing Appeal, Bond on Appeal and Praecipe for Transcript on Appeal in the above and therein entitled action, and that the same together constitute the record on appeal as specified in the said Praecipe for Transcript on Appeal filed in my office on behalf of the appellant by his solicitor of record.

I do further certify that the cost of the foregoing record is \$10.90, the amount whereof has been paid me by George D. Parker, the appellant in said action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United [27] States of America, in and for the Southern District of California, Southern Division, this 19th day of April, in the year of our Lord one thousand nine hundred and sixteen,

and of our Independence the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,
Clerk of the District Court of the United States of
America, in and for the Southern District of
California.

By Leslie S. Colyer,
Deputy Clerk.

[Ten cent Internal Revenue Stamp. Canceled
April 19, 1916. L. S. C.] [28]

[Endorsed]: No. 2793. United States Circuit
Court of Appeals for the Ninth Circuit. George D.
Parker, Appellant, vs. Fred Stebler, Appellee.
Transcript of Record. Upon Appeal from the
United States District Court for the Southern Dis-
trict of California, Southern Division.

Filed May 4, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Order Enlarging Time to File Record and Docket
Cause to April 29, 1916.]

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

GEORGE D. PARKER,

Appellant,

vs.

FRED STEBLER,

Appellee.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellant to docket said cause and file the record thereof, with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 29th day of April, 1916.

Dated at Los Angeles, California, February 19, 1916.

TRIPPET,
U. S. District Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. George D. Parker, Appellant, vs. Fred Stebler, Appellee. Order Extending Time to File Record. Filed Feb. 26, 1916. F. D. Monckton, Clerk.

**[Order Enlarging Time to File Record and Docket
Cause to July 1, 1916.]**

*United States Circuit Court of Appeals, for the
Ninth Circuit.*

(No. A-90—Eq. S. D.)

GEORGE D. PARKER,

Appellant,

vs.

FRED STEBLER,

Appellee.

Good cause appearing therefor, it is hereby ordered that the time within which appellant in the above-entitled action may file record and docket cause in the United States Circuit Court of Appeals, for the Ninth Circuit be, and the same hereby is extended to and including the 1st day of July, 1916.

Los Angeles, 3/28, 1916.

TRIPPET,
District Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals, for the Ninth Circuit. George D. Parker, Appellant, vs. Fred Stebler, Appellee. Order Extending Time to Docket Cause and File Record. Filed Apr. 3, 1916. F. D. Monckton, Clerk.

No. 2793. United States Circuit Court of Appeals, for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to July 1, 1916, to File Record Thereof and to Docket Case. Refiled May 4, 1916. F. D. Monckton, Clerk.

No. 2793

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE D. PARKER,

Appellant,

VS.

FRED STEBLER,

Appellee.

APPELLANT'S BRIEF

N. A. ACKER,

Solicitor for Appellant

Filed

SEP 25 1916

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE D. PARKER,
Appellant,

vs.

FRED STEBLER,
Appellee.

} In Equity
} Appeal Case
} No. 2793.

BRIEF OF APPELLANT
GEORGE D. PARKER.

This is a companion case to appeal case No. 2792, and comes before this Court on an appeal from the Final Decree made and entered in the above entitled suit on the Sixth day of December, 1915, by the District Court of the United States for the Southern District of California, Southern Division, and by which final decree the above suit, in the lower Court entitled Fred Stebler vs. George D. Parker, No. A-90, and eight companion suits were dismissed on the voluntary motion of the Complainant-Appellee and with costs to the Complainant in each case.

It is needless herein to repeat that which has been set forth in our brief filed in connection with appeal case No. 2792, for that which has been stated therein applies with full force to the present appeal.

The final decree from which the present appeal is taken, and equally so the final decree entered in each of the eight companion cases, provided for the payment of a solicitor's docket fee of Twenty dollars unto the Complainant, in addition to the costs incident to the filing of the suits.

As in connection with the companion appeal No. 2792, it is the final decree from which the present appeal is taken, the same not being an appeal from costs.

In the lower Court, United States Reissue Letters Patent No. 12297 were not involved in the present case, but the suit for infringement in this case and the companion eight cases was based on two United States Letters Patent, neither of which was in issue in Equity suit No. 1562 referred to in companion appeal case No. 2772, which appeal case was the outgrowth of said equity suit.

The recitals set forth in appeal case No. 2792 leading to the filing of said suit and the companion thirty-one suits, apply to the present appeal case and its companion eight suits.

This suit and its companion suits were instituted after the rendition of decision holding infringement in Equity suit No. 2772, and the machines alleged in the Bills of Complaint to be an infringement of the two Letters Patent on which the suits were based,

were manufactured and sold by Appellant George D. Parker, one of the defendants to said equity suit No. 2792.

The Appellant herein was sued as the manufacturer of the machine alleged to be an infringement of the two Letters Patent sued upon, and the Defendants to the eight dismissed companion suits are vendee users of the claimed infringing manufacturer.

As set forth in the statement of proceedings, record page 9, these machines alleged in the Bill of Complaint to be infringements of two United States Letters Patent, other than United States Reissue Letters Patent No. 12297 (which Reissue Letters Patent were not sued on nor involved in this and the eight companion suits), were placed on the market by the manufacturer, the said George D. Parker, and were known and were designated as the "Parker Modified Machine."

The present suit and the eight companion suits were instituted prior to the accounting had under Equity suit No. 1562, fully set forth in appeal case No. 2792.

On accounting in case No. 1562, the "Parker Modified Machine" was held to be an infringement of the said Reissue Letters Patent No. 12297, and the Master included these machines in his report recommending to the Court the profits and damages payable from the manufacturer—George D. Parker, unto the Appellee herein, which report was confirmed by the Court and judgment entered accordingly.

The judgment for said profits, damages and the cost of said suit No. 1562 was duly satisfied and fully

paid by said Defendant—George D. Parker; record p. 10.

Although, as stated, the present suit and its eight companion suits were not based on an infringement of Reissue Letters Patent No. 12297 of suit No. 1562 under which the said accounting was had, nevertheless, the Complainant-Appellee herein, after satisfaction of said judgment in case No. 1562, which satisfaction included the profits and damages for the machines sold to and used by the vendees of said George D. Parker, and before any hearing on the merits of said suits relative to the question of infringement of the two Letters Patent charged to have been infringed, voluntarily moved for the dismissal of the suit involved in the present appeal case and also for the dismissal of its eight companion cases with costs to the Complainant. This motion was granted, and the final decree, from which this appeal is taken, made and entered, and said decree provided for judgment against the Defendant for costs of suit, which costs included a solicitor's docket fee of Twenty Dollars.

Under these circumstances, to wit, the voluntary dismissal of suit by the Complainant, the final decree of the lower Court should not have provided for any costs unto the Complainant. It is not the amount of costs which is herein complained of, but the allowance of any costs on a voluntary dismissal of suit.

The Appellant was entitled, not only to contest the validity of the two Letters Patent in suit, but also the question of infringement. After hearing on full proof, the final decree might have found non-

infringement, or held invalidity of the Letters Patent. In either case, costs would have been taxed against the Complainant. Under the course pursued by the Complainant herein and upheld by the lower Court, the Defendant-Appellant is required to contribute a solicitor's docket fee to Complainant's solicitor and costs to the Complainant, due to the fact that the Complainant desired to institute suits against the manufacturer and the vendees of the manufacturer.

To sustain the decision of the lower Court in the present instance, is to sanction the wanton institution of suits and establish a practice which appeals to the cupidity of practitioners.

We submit that the lower Court, on the voluntary dismissal of the present appeal case, and its eight companion cases, should have decreed costs in favor of Appellant, as set forth in our first assignment of error, record page 14.

We further submit that no costs on a voluntary dismissal of suit should have been allowed unto Complainant, as set forth in our second assignment of error.

We finally submit that on the voluntary dismissal of suit, there should have been no allowance of a solicitor's docket fee as taxable costs, as set forth in our third assignment of error.

All of which is respectfully submitted.

N. A. ACKER,

Solicitor and Counsel for Appellant.

No. 2793.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

George D. Parker,

Appellant,

vs.

Fred Stebler,

Appellee.

APPELLEE'S BRIEF.

FREDERICK S. LYON,
504 Merchants Trust Building,
Los Angeles, California
Solicitor for Appellee

File

001 2-1

F. D. Mon

No. 2793.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

George D. Parker,

Appellant,

vs.

Fred Stebler,

Appollee.

APPELLEE'S BRIEF.

The appeal in this case, like that in appeal case No. 2792, involves solely and alone a question of costs. For each of the reasons urged in appellee's brief in case No. 2792 this appeal should be and must be dismissed.

The cases, however, differ in one material respect as to the circumstances under which this suit was commenced. As stated in the Transcript of Record, page 9, after the entry of the interlocutory decree in suit No. 1562 one of the defendants therein, George D. Parker, commenced the manufacture and installation of certain other fruit grading and distributing apparatus and installed several of the same. This suit

was commenced to enjoin the infringement on account of such grading and distributing apparatus (which was not the so-called “modified” Parker machines involved in the accounting in No. 1562, but was an entirely different construction and form of apparatus), and this suit was not brought on reissue patent No. 12,297, the one involved in suit No. 1562, but upon two other patents owned by appellee. After the commencement of this suit and after appellant had filed his answer herein, and while motion for temporary injunction was pending herein, appellant changed and modified the construction of such machines to avoid the charge of infringement of the two patents sued on herein. Such modification made these machines of the construction and type referred to as the “modified” Parker machine held by the master in the accounting in No. 1562 to be an infringement of the reissue letters patent No. 12297.

We thus see that after this suit at bar was commenced to avoid the charge of infringement of these two other patents involved in this case, the appellant modified the machines so that they then infringed the reissue patent No. 12297 and were brought into the accounting in No. 1562. It followed that when the judgment on the accounting had been entered and paid, these modified machines became licensed, under the decision of this court in 214 Fed. 550.

At the time this suit was commenced, and under the issues of the pleadings in this suit, the Strain reissue patent No. 12,297 was in no manner involved, nor would the accounting in that suit have had any effect

upon these machines, nor would any license for these machines have inured to this appellant had he not, *after the motion for injunction in this case was made*, modified the machines to escape the charge of infringement in this case, and thereby brought the machines under the charge of infringement in case No. 1562.

Under these circumstances, and they were all before the District Court and part of its records, and all these facts were brought out upon the accounting in No. 1562 in tracing the history of these machines, the District Court held that the only thing left to adjudicate in this case at bar was who should pay the costs of suit, and adjudged that under the circumstances they should be taxed against the defendant, who is appellant here. Whether such costs should have been taxed against the appellant or appellee was within the discretion of the court, and there is nothing in the record to show that the District Court abused its discretion.

Like in appeal No. 2792, appellant did not take any appeal from the taxation of costs by the clerk of the court, and it is also insisted that there can be no review of the question of costs in this court for that reason. The transcript does not show that any solicitor's docket fee was taxed. If there was any solicitor's docket fee taxed there was no appeal from the action of the clerk in taxing such docket fee, and any such action of the clerk in taxing the solicitor's docket fee would not be open to review in this court under the decision of this court in *Tyler Mining Co. v. Sweeny*, 79 Fed. 277, 282.

Undoubtedly items of expense were taxed against appellant in this case by virtue of the motion for temporary injunction, which appellant avoided by entirely changing the character of the infringing machines. In this connection it is to be noted that had appellant not modified these machines after this suit was brought, the accounting in No. 1562 would have had no bearing whatever upon this suit, as there was no charge in this suit of any infringement of reissue patent No. 12,297. This is clear from the fact that this suit was brought after the injunction had been affirmed in No. 1562 by this court (214 F. 550), and appellee was not in contempt for bringing this suit.

The appeal should be dismissed and the judgment affirmed with costs of this court in favor of the appellee.

FREDERICK S. LYON,

Solicitor for Appellee.

No. 2794

United States
Circuit Court of Appeals
For the Ninth Circuit.

TOKU SAKI,

Appellant,

VS.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Hawaii.

Filed

JUL 1 - 1916

F. D. Monckton,

Clerk.

No. 2794

United States
Circuit Court of Appeals
For the Ninth Circuit.

TOKU SAKI,

Appellant,

VS.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Hawaii.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Return to Writ of Habeas Corpus...	19
Assignment of Errors	52
Attorneys Names and Addresses of.....	1
Bond on Appeal	47
Cablegram, Acting Secretary to Immigration Service, Honolulu	30
Certificate of Clerk, U. S. District Court to Transcript of Record.....	65
Citation on Appeal.....	61
Clerk's Statement.	3
Decree	45

EXHIBITS:

Exhibit "A"—Cablegram, Post to Immigra- tion, Honolulu	28
Final Hearing, Order Discharging Writ of Habeas Corpus and Order Releasing Peti- tioner on Bond Pending Appeal.....	32
Letter, Immigrant Inspector, December 18, 1913, to Sheldon	26
Letter, March 16, 1914, Halsey to Secretary of Labor	24
Letter, April 10, 1914, Inspector in Charge to Sheldon	22

Index.	Page
Memorandum of Immigrant Inspector Re filing of Brief	25
Memorandum of Immigrant Inspector That no Further Evidence Will be Offered.	25
Names and Addresses of Attorneys.	1
Opinion	43
Order Allowing Appeal	51
Order Continuing Hearing to January 14, 1916.	17
Order Continuing Hearing to January 28, 1916.	18
Order Continuing Hearing to February 28, 1916.	18
Order Continuing Hearing to March 1, 1916.	19
Order Continuing Cause to March 4, 1916.	31
Order Extending Time to March 25, 1916 to Per- fect Appeal	46
Order Extending Time to Transmit Record on Appeal.	1
Order in re Release of Petitioner, etc.	11
Petition for Allowance of Appeal and for Appeal	50
Petition for a Writ of Habeas Corpus.	5
Praecipe for Transcript.	63
Proceedings Had March 4, 1916.	33
Recognizance	12
Remarks by Examining Inspector, March 16, 1914	24
Return of Richard L. Halsey to Order to Show Cause	15
Testimony of Toku Sakai Before Immigration Inspector	29
Writ of Habeas Corpus.	9

Names and Addresses of Attorneys.

FOR PETITIONER: TOKU SAKAI,

**WILLIAM T. RAWLINS, Esq., #306-307 Bank
of Hawaii Building, Honolulu, Hawaii.**

**GEORGE A. DAVIS, Esq., #200 Bank of
Hawaii Building, Honolulu, Hawaii.**

**FOR RESPONDENT: RICHARD L. HALSEY,
U. S. Immigration Inspector in Charge at
the Port of Honolulu.**

**HORACE W. VAUGHAN, Esq., United States
District Attorney, Honolulu, Hawaii. [1*]**

*In the United States District Court in and for the
District and Territory of Hawaii.*

No. 94.

In the Matter of the Application of TOKU SAKAI
for a Writ of Habeas Corpus.

**Order Extending Time to Transmit Record on
Appeal.**

Now on this 22d day of April, A. D. 1916, it appearing from the representations of the clerk of this Court, that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said

*Page-number appearing at foot of page of original certified Record.

transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to May 15, A. D. 1916.

Dated, Honolulu, T. H., April 22d, 1916.

CHAS. F. CLEMONS,

Judge, U. S. District Court.

Due service of the above order, and receipt of a copy thereof are hereby admitted this 22d day of April, A. D. 1916.

GEO. A. DAVIS,

Attorney for Petitioner.

HORACE W. VAUGHAN,

U. S. Atty. [2]

[Endorsed]: #94. United States District Court, Territory of Hawaii. In the Matter of the Application of Toku Sakai for a Writ of Habeas Corpus. Order Extending Time to Transmit Record on Appeal. Filed Apr. 22, 1916. George R. Clark, Clerk. By Ray B. Rietow, Deputy Clerk.

*In the United States District Court for the Territory
of Hawaii.*

No. 94.

In the Matter of the Application of TOKU SAKAI
for a Writ of Habeas Corpus.

Clerk's Statement.

TIME OF COMMENCEMENT OF SUIT.

April 13, 1914: Verified Petition for writ of Habeas Corpus filed and writ issued to the U. S. Marshal for the District of Hawaii.

NAMES OF ORIGINAL PARTIES.

Petitioner: TOKU SAKAI.

Respondent: Richard L. Halsey, U. S. Inspector of Immigration in Charge at the Port of Honolulu.

DATES OF THE FILING OF THE PLEADINGS.

April 13, 1914: Petition, Order and Writ.

May 28, 1914: Return of Richard L. Halsey.

March 3, 1916: Amended Return of Richard L. Halsey.

SERVICE OF PROCESS.

April 13, 1914: Writ issued and delivered to the United States Marshal for the District of Hawaii. Said Writ with the United States Marshal's Return thereon filed on return, April 14, 1914, the said return reading as follows, to wit: The within Petition, Order and Writ of Habeas Corpus were received by me on the 13th day of April, A. D. 1914, and are returned as executed in Honolulu, on the 13th day of April, A. D. 1914, by hand, upon Richard L. Halsey, United States Immigration Inspector in Charge at the Port of Honolulu, by exhibiting to him the original and handing to and leaving with him a certified copy of the within Petition, Order and Writ of Habeas Corpus, E. R. Hendry, U. S. Marshal. By (Sgd.) H. H. Holt, Chief Office Deputy. Dated Honolulu, T. H., April 14, 1914." [3]

HEARINGS.

April 14, 1914: Hearing on return to writ and order releasing petitioner on bond.

March 4, 1916: Proceedings at decision, discharging writ, order allowing applicant 15 days to perfect appeal and order releasing said applicant on bond pending appeal.

March 16, 1916: Hearing in re extension of time to perfect appeal and order allowing same.

The above hearings were had before the Honorable SANFORD B. DOLE and the Honorable CHARLES F. CLEMONS.

DECISION.

March 4, 1916: Decision in cause, by Clemons, J.

March 6, 1916: Decree filed and entered.

PETITION FOR APPEAL.

March 23, 1916: Petition for Appeal and order allowing same filed.

United States of America,
District of Hawaii,—ss.

I, George R. Clark, Clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; and account of the proceedings showing the service of the writ herein and the time when the judgment herein was rendered and the Judge rendering same, in the matter of the application of Toku Sakai for a Writ of Habeas Cor-

pus, Number 94, in the United States District Court for the District of Hawaii.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 29th day of April, A. D. 1916.

[Seal]

GEORGE R. CLARK,
Clerk, U. S. District Court, Territory of
Hawaii. [4]

*In the District Court of the United States, in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of TOKU SAKAI for a Writ of Habeas Corpus, to be Directed to RICHARD L. HALSEY, United States Inspector of Immigration at the Port of Honolulu, Commanding and Directing Him to have and Produce the Body of the Petitioner, TOKU SAKAI.

Petition for a Writ of Habeas Corpus.

To the Honorable the District Court of the United States in and for the District and Territory of Hawaii, and to the Honorable the Presiding Judges thereof:

Your petitioner, Toku Sakai, respectfully shows to this Honorable Court and alleges and charges as follows:

I.

That she has been a resident of the Territory of Hawaii for a period of about eleven years prior to the date of this petition, and that she is not an alien or alien resident within the meaning of the laws of the United States hereinafter referred to.

II.

That your petitioner is imprisoned and restrained of her liberty by Richard L. Halsey, Esq., Inspector in Charge of [5] the United States Immigration Station at the Port of Honolulu, without authority of law and contrary to the provisions of the Constitution of the United States of America and the rules and regulations adopted by the United States Department of Labor and by the Bureau of Immigration.

III.

That the cause and pretense of such imprisonment and restraint, according to the knowledge and belief of your petitioner, is that the Secretary of Labor of the United States of America has by his warrant of deportation ordered your petitioner to be deported from the Port of Honolulu to the Empire of Japan and that such imprisonment and restraint is for the purpose of such deportation; that the alleged reason, as shown by and contained in said warrant for such deportation is, as your petitioner is informed and believes, that your petitioner at said Honolulu did practice prostitution, contrary to the provisions of the Acts of Congress in such case made and provided; that your petitioner has no copy of the warrant of deportation hereinbefore referred to which she can attach hereto and make a part hereof; that said imprisonment and restraint is illegal, unlawful, contrary to the provisions of the Constitution of the United States, the Immigration Laws of the United States, and the Rules and Regulations of the Bureau of Immigra-

tion, and in that behalf your petitioner alleges and says that the hearing had before the Special Board of Inquiry was not a full and fair and bona fide hearing and the findings of said Board were based upon only the semblance of a hearing; and the said petitioner was not represented by counsel at said hearing, and that she is unable to read and write the English language or to understand the same and that the said warrant of arrest was illegally [6] and unlawfully issued and is not based upon any valid finding supported by evidence of any Board of Inquiry or officer of the Department of Labor, Bureau of Immigration authorized or empowered to hold such hearings.

And your petitioner prays that the said warrant of arrest and all the evidence given in support thereof may be produced upon the hearing of this petition, the same being now in the custody of the said Richard L. Halsey; and this petitioner prays that the same may be made a part of this paragraph of this her petition.

IV.

That your petitioner did not have a fair and *bona fide* hearing before any Board of Special Inquiry or an officer of the Department of Labor, Bureau of Immigration authorized and empowered to conduct such hearing; and there is no evidence that your petitioner practiced prostitution, was or is a prostitute in the District of Hawaii at the times alleged in the complaint and warrant of deportation, and such warrant was issued without authority of law and contrary to the rules and regu-

lations of the United States Department of Labor, Bureau of Immigration; and the said warrant of arrest is therefore illegal and void, and the said Richard L. Halsey now holds and detains your petitioner and intends to deport her to the Empire of Japan by a steamship leaving Honolulu this day.

WHEREFORE, your petitioner prays that a writ of habeas corpus be forthwith issued by this Honorable Court, commanding the said Richard L. Halsey, United States Inspector in Charge of Immigration at the Port of Honolulu aforesaid, to have and produce the body of the said Toku Sakai, your petitioner before this Honorable Court at the courtroom in [7] the Model Block, in the City of Honolulu, City and County of Honolulu, Territory of Hawaii, on the 14th day of April, 1914, at 10 o'clock A. M., in order that the alleged cause of imprisonment and restraint and the legality and constitutionality thereof may be inquired into, and that in case said imprisonment and restraint are unlawful and in violation of the United States Constitution or contrary to the rules and regulations of the Bureau of Immigration, that your petitioner may be discharged therefrom.

Dated this 13th day of April, A. D. 1914.

(Sgd.) TOKU SAKAI,

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

Toku Sakai, being first duly sworn, deposes and says: That she is the petitioner in the foregoing petition; that the same has been read and explained

to her; that she knows the contents thereof and that the same is true, except as to those matters therein alleged upon information and belief, and as to those matters so alleged, she believes them to be true.

(Sgd.)

TOKU SAKAI.

Subscribed and sworn to before me this 13th day of April, A. D. 1914.

(Notarial Seal) (Sgd.) J. M. CAMARA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

(Sgd.) WILLIAM T. RAWLINS,
Attorney for Petitioner.

Let writ issue as prayed.

13 April, 1914.

(Sgd.) CHAS. F. CLEMONS,
Judge. [8]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of TOKU SAKAI for
a Writ of Habeas Corpus.

Writ of Habeas Corpus.

The President of the United States of America: To
RICHARD L. HALSEY, United States Immi-
gration Inspector in Charge at the Port of
Honolulu, District and Territory of Hawaii, and
His Deputy:

You and each of you are hereby commanded that
you have and produce the body of Toku Sakai, by
you unlawfully detained and imprisoned as is al-
leged and charged in the petition for this writ now

on file in this Honorable Court, before the District Court of the United States in and for the District of Hawaii at the Courtroom of said Court in the Model Block so called, in Honolulu, at 10 o'clock in the forenoon of the 14th day of April, A. D. 1913, together with the cause of the imprisonment and detention of her, the said Toku Sakai, to undergo and receive what our said Court shall consider and determine concerning her in this behalf.

And we do further command the Marshal of the District of Hawaii to forthwith serve this writ of habeas corpus and that he have then and there this writ.

WITNESS the Honorable SANFORD B. DOLE, Judge of the District Court of the United States in and for the District and Territory of Hawaii, this 13th day of April, A. D. 1913.

[Seal]

A. E. MURPHY,

Clerk of the District Court of the United States in
and for the District and Territory of Hawaii.

By (Sgd.) F. L. Davis,

Deputy Clerk. [9]

United States Marshal's Office.

Marshal's Return.

The within petition, order and writ of habeas corpus were received by me on the 13th day of April A. D. 1914, and are returned as executed in Honolulu, on the 13th day of April A. D. 1914, by hand, upon Richard L. Halsey, United States Immigration Inspector in Charge at the port of Honolulu, by exhibiting to him the original and handing to and leaving with him a certified copy of the within peti-

tion, order and writ of habeas corpus.

Dated, Honolulu, T. H., April 14, 1914.

E. R. HENDRY,

U. S. Marshal.

By (Sgd.) H. H. Holt,

Chief Office Deputy. [10]

[Endorsed]: No. 94. (Title of Court and Cause.)
Petition for Writ of Habeas Corpus. Filed April
13th, 1914. A. E. Murphy, Clerk. By (Sgd.) F. L.
Davis, Deputy Clerk. [11]

Order in re Release of Petitioner, etc.

From the Minutes of the United States District
Court, Vol. 9, Tuesday, April 14, 1914.

(DOLE, Presiding Judge.)

(Title of Court and Cause.)

On this day came the above applicant in person
and with her counsel, Mr. W. T. Rawlins and Mr.
George A. Davis, and also came Mr. J. W. Thomp-
son, Assistant United States Attorney, on behalf of
the respondent herein, and this cause was called for
hearing on respondent's return to the Writ herein.
Thereupon, on motion of Mr. Thompson and consent
of counsel for the applicant, it was by the Court
ordered that this cause be continued until called up
for hearing, and that the said applicant be released
upon furnishing a bond herein in the sum of \$250.00.

[12]

*In the District Court of the United States, in and for
the Territory and District of Hawaii.*

In the Matter of the Application of TOKU SAKAI,
for a Writ of Habeas Corpus.

Recognizance.

The United States of America,
Territory of Hawaii,—ss.

BE IT REMEMBERED, that on the 14 day of April, A. D. 1914, before me, F. L. Davis, Deputy Clerk of the District Court of the United States, within and for the Territory and District of Hawaii, duly appointed by said Court and duly qualified and acting as such deputy clerk, personally came Toku Sakai, as principal, and Patrick Silva and Isaac L. Cockett, as sureties, and jointly and severally acknowledged themselves to owe to the United States of America the sum of TWO HUNDRED AND FIFTY DOLLARS, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

THE CONDITION OF THIS RECOGNIZANCE is such, that whereas, heretofore, and on, to wit, the 14th day of April, A. D. 1914, a writ of habeas corpus was duly issued out of said Court citing Richard L. Halsey, Esquire, United States Immigration Inspector in Charge at the Port of Honolulu, to have and produce the body of said Toku Sakai before said Court on Saturday, the 10th day of May, at the hour of ten o'clock in the forenoon of said day, and from

day to day and time to time thereafter when required to appear.

WHEREAS, in obedience to said Writ, the said Richard L. Halsey, duly produce before said Court the said Toku Sakai, and, [13]

WHEREAS, the Court has entertained and granted a motion of the said Toku Sakai for release on recognizance pending the final hearing and determination of said writ of habeas corpus, and the said recognizance has been fixed at the sum of Two Hundred and Fifty Dollars by the Honorable Sanford B. Dole, Judge of said Court,—

NOW, THEREFORE, if the said Toku Sakai shall duly appear in the District Court of the United States, in and for the District and Territory of Hawaii whenever thereunto ordered by a Judge thereof until the final determination of said cause in said United States District Court, or in case an appeal shall be taken to the United States Circuit Court of Appeals of the Ninth Circuit until final decision in said Court of Appeals, then this obligation shall be void; otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 14th day of April, A. D. 1914.

Signed in Japanese: TOKU SAKAI.

Witness to signature in Japanese:

(Sgd.) S. ADACHI.

(Sgd.) PATRICK SILVA.

(Sgd.) ISAAC L. COCKETT.

Taken and acknowledged before me the 14th day of April, A. D. 1914.

[Seal] (Sgd.) F. L. DAVIS,
Deputy Clerk, U. S. District Court, Territory of
Hawaii.

United States of America,
Territory of Hawaii,—ss.

Patrick Silva and Isaac L. Cockett, parties to the above bond, being duly sworn, do depose and say, each for himself, that he is worth the sum of Two Hundred and Fifty Dollars over and above his just debts, liabilities and exemptions, and that his property is situate in said Territory and subject to execution.

(Sgd.) PATRICK SILVA.

(Sgd.) ISAAC L. COCKETT. [14]

Subscribed in my presence and sworn to before me this 14th day of April, A. D. 1914.

(Sgd.) F. L. DAVIS, (Seal)
Deputy Clerk, U. S. District Court, Territory of
Hawaii.

Approved:

(Sgd.) JEFF McCARN,
United States Attorney.

Approved:

(Sgd.) S. B. DOLE,
Judge.

[Endorsed]: No. 94. (Title of Court and Cause.)
Recognizance. Filed Apr. 14, 1914. A. E. Murphy,
Clerk. By (Sgd.) F. L. Davis, Deputy. [15]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Petition of TOKU SAKAI, for
a Writ of Habeas Corpus.

Return of Richard L. Halsey to Order to Show Cause.

To the Honorable SANFORD B. DOLE and the
Honorable CHARLES F. CLEMONS, Judges
of the United States District Court for the Ter-
ritory of Hawaii.

Comes now Richard L. Halsey, Inspector in Charge
of the Immigration Station of the United States at
the Port of Honolulu, and in obedience to the order
to show cause does hereby certify and say in return
to said order in the above styled cause as follows:

1. He admits:

(a) That he is the Inspector in Charge of the
United States Immigration Station at the Port of
Honolulu, Territory and District of Hawaii.

(b) That the petitioner is a Japanese alien resi-
dent of and within the District of Hawaii, and has
been for a long period of time, but she does not
know how long.

(c) That she has been arrested upon a warrant
issued by the Secretary of Labor on the 17th day
of October, 1913.

(d) That a warrant of Deportation was issued
gainst her by the Secretary of Labor on the 25th
day of March, 1914. [16]

(e) That she is held and detained by operation
of said warrants.

2. He denies:

(a) That petitioner is imprisoned and restrained illegally or without authority of law.

(b) That her imprisonment and restraint is contrary to the provisions of the Constitution of the United States.

(c) That her imprisonment and restraint is contrary to the Rules and Regulations of the Bureau of Immigration.

3. All copies of warrants, orders, letters, cablegrams, etc., filed in this cause are hereby made a part and parcel of this answer to show cause and reference thereto is specifically made. The same clearly showing by her own testimony that she did practice prostitution for a period of at least five years, also showing that she is an alien resident within the limits of the District of Hawaii, bringing the case clearly within the prohibited class of aliens as set out and described in the Act of Congress regulating Immigration to the United States, passed February 20, 1907, and as amended and approved March 26, 1910, in Section 3 of said Act.

4. The warrant of arrest was regular and was based upon ample and sufficient evidence. And after her own confession of having practiced prostitution within the District for a period of five years, the warrant of deportation was issued by the Secretary of Labor, all of which was regular, ample and sufficient.
[17]

5. That by reason of the premises, and the further fact that the conclusion of the Secretary of Labor is made final by law, this Court has not any jurisdic-

tion to make further inquiry into the facts, and that such decision was reached and arrived at after a fair hearing and a decision on the merits of the cause, and was based upon the evidence and the law applicable to the case.

WHEREFORE, your respondent prays the petition in this cause be dismissed and that the said TOKU SAKAI be further remanded to the custody of your respondent to be dealt with as the law directs.

Dated May 28th, 1914.

(Sgd.) RICHARD L. HALSEY,

Inspector in Charge.

(Sgd.) J. WESLEY THOMPSON,

Assistant U. S. Attorney. [18]

[Endorsed]: No. 94. (Title of Court and Cause.)
Return of Richard L. Halsey. Filed May 28, 1914.
A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa,
Deputy Clerk. [19]

Order Continuing Hearing to January 14, 1916.

From the Minutes of the United States District
Court, Vol. 10, Tuesday, January 4, 1916.

(CLEMONS, Presiding Judge.)

(Title of Court and Cause.)

On this day came Mr. George A. Davis, counsel for the above applicant, and also came Mr. Horace W. Vaughan, United States Attorney, on behalf of the respondent herein, and this cause was called for disposition. Thereupon it was by the Court ordered that this cause be continued to January 14, 1916, at 10 o'clock A. M., for hearing. [20]

Order Continuing Hearing to January 28, 1916.

From the Minutes of the United States District Court, Vol. 10, Friday, January 14, 1916.

(CLEMONS, Presiding Judge.)

(Title of Court and Cause.)

On this day came the above applicant in person and with her counsel, Mr. George A. Davis and Mr. W. T. Rawlins, and also came Mr. Horace W. Vaughan, United States Attorney, on behalf of the respondent herein and this cause was called for hearing. Thereupon on motion of Mr. Vaughan and consent of counsel for the applicant, it was by the Court ordered that this cause be continued to January 28, 1916, at 10 o'clock A. M., for hearing. [21]

Order Continuing Hearing to February 28, 1916.

From the Minutes of the United States District Court, Vol. 10, Friday, January 28, 1916.

(CLEMONS, Presiding Judge.)

(Title of Court and Cause.)

On this day came the above applicant in person and with her counsel, Mr. W. T. Rawlins, and also came Mr. Horace W. Vaughan, United States Attorney, on behalf of the respondent herein, and this cause was called for hearing. Thereupon it was by the Court ordered that this cause be continued to February 28, 1916, at 10 o'clock A. M., for hearing. [22]

Order Continuing Hearing to March 1, 1916.

From the Minutes of the United States District Court, Vol. 10, Monday, February 28, 1916.

(CLEMONS, Presiding Judge.)

(Title of Court and Cause.)

On this day came the above applicant in person and with her counsel, Mr. W. T. Rawlins and Mr. George A. Davis, and also came Mr. Horace W. Vaughan, United States Attorney, on behalf of the respondent herein and this cause was called for hearing. Thereupon it was by the Court ordered that this cause be continued to March 1, 1916, at 2 o'clock, P. M., for hearing. [23]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of TOKU SAKAI,
for Writ of Habeas Corpus.

Amended Return to Writ of Habeas Corpus.

Comes Richard L. Halsey, the respondent, by Horace W. Vaughan, United States Attorney, and by leave of the Court files as a part of the record in this case, the record of the proceedings had before the Immigration officials at Honolulu, by virtue of which the applicant in this case was ordered deported, and asks that the same be considered as a part of the return of the respondent herein, and as a part of the record in this case.

The respondent shows to the Court that on Sep-

tember 29, 1913, Honorable J. B. Densmore, Acting Secretary of Commerce and Labor, sent the cablegram, a copy of which is attached hereto as a part of the record aforesaid, commanding the arrest of Toku among others, the said name Toku Takai, being intended for the applicant herein, and that by virtue of the said order the applicant herein was arrested and on October 2d, 1913, was given a hearing before Inspector Harry B. Brown, and at said hearing the applicant, being sworn, admitted under oath that she had been practicing prostitution for about one year, and that she had first started the occupation of prostitution about five years prior thereto. That the testimony [24] of the applicant is attached hereto as a part of the hearing. That thereafter, on October 17th, 1913, Louis F. Post, Acting Secretary of Commerce and Labor, sent the cablegram order of arrest, a copy of which is attached hereto as a part of the record aforesaid, commanding the arrest of Toku Sakai, the applicant herein, and thereafter upon the evidence theretofore taken, upon the admission theretofore made by the applicant herein, on October 17th, 1913, the said Louis F. Post issued the order of deportation, a copy of which is hereto attached.

That afterwards, on March 28, 1914, Honorable J. B. Densmore, Acting Secretary of Commerce and Labor, acting upon the evidence taken at the hearing aforesaid before Harry B. Brown, issued the order, a copy of which is hereto attached as a part of the record aforesaid, commanding the deportation of the applicant.

The respondent says that from the evidence before the Immigration officials, duly had in accordance with law, the applicant herein was adjudged to be an alien prostitute and had been found practicing prostitution subsequent to her entry into the United States and that she had admitted that she had been practicing prostitution subsequent to her entry.

WHEREFORE, respondent prays that the writ be discharged and that applicant be remanded to the custody of respondent to be dealt with in accordance with law.

(Sgd.) RICHARD L. HALSEY,
Inspector in Charge.

(Sgd.) HORACE W. VAUGHAN,
United States Attorney.

Horace W. Vaughan, being first duly sworn according to law, deposes and says that the foregoing facts are true.

(Sgd.) HORACE W. VAUGHAN.

Subscribed in my presence and sworn to before me this 3d day of March, 1916.

[Seal]

(Sgd.) F. L. DAVIS,
Clerk. [25]

**Letter, April 10, 1914, Inspector in Charge to
Sheldon.**

No. 4280/90.

April 10th, 1914.

Mr. Wm. J. Sheldon,
Attorney at Law,
Merchant Street, Honolulu, T. H.

Sir:

This morning Warrant of Deportation for TOKU SAKAI was received, and you are directed to have her surrender herself at this office Monday, April 13th, 1914, at 10:00 A. M., prepared for deportation.

Respectfully,

Inspector in Charge.

HBB/JLM. [26]

Form 562.

(COPY)

WARRANT—DEPORTATION OF ALIEN.
UNITED STATES OF AMERICA,
DEPARTMENT OF COMMERCE AND LABOR,
Washington.

No. 53678/465.

To RICHARD L. HALSEY, Inspector in Charge,
Honolulu, T. H.

Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector Harry B. Brown, held at Honolulu, T. H., I have become satisfied that the alien TOKU SAKAI, who landed at the port of Honolulu, T. H., has been found in the United

States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That the said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States, and may be deported in accordance therewith:

I, J. B. Densmore, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to Japan, the country whence she came, at the expense of the appropriation "Expenses of Regulating Immigration, 1914." You are directed to purchase transportation for the alien from Honolulu, T. H., to her home in Japan at the lowest scheduled rate obtainable from the Pacific Mail Steamship Company, payable from the above mentioned appropriation.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 28th day of March, 1914.

(Signed) J. B. DENSMORE,

Acting Secretary of Commerce and Labor.

CEB.

11-2721. [27]

Letter, March 16, 1914, Halsey to Secretary of Labor.

(COPY)

No. 4280/90.

March 16th, 1914.

The Honorable,

The Secretary of Labor,

Washington, D. C. (Thru Commissioner-
General of Immigration).

There is transmitted herewith the testimony in the case of TOKU SAKAI, who was arrested and given a hearing as directed in Warrant of Arrest No. 53678/465.

(Signed) RICHARD L. HALSEY,
Inspector in Charge.

HBB/JLM. [28]

In re:

TOKU SAKAI,

No. 4280/90.

DEPARTMENT OF LABOR,
UNITED STATES IMMIGRATION SERVICE.

Port of Honolulu, T. H.,

March 16th, 1914.

Remarks by Examining Inspector.

From the testimony of this woman it appears that she is an alien and that she has been practicing prostitution for a livelihood.

It therefore appears that she is a proper person for whom a warrant of deportation should issue.

Immigrant Inspector.

HBB/JLM. [29]

TOKU SAKAI.

#4280/90.

DEPARTMENT OF LABOR,
UNITED STATES IMMIGRATION SERVICE.

Port of Honolulu, T. H.,

March 12th, 1914.

MEMORANDUM.

On December 22d, 1913, attorney W. J. Sheldon stated that he desired time to file a brief in this case. He was this date communicated with and states that he does not desire to file a brief or do anything further in this case.

(Signed) HARRY B. BROWN,
Immigrant Inspector.

HBB/JLM. [30]

Honolulu, T. H.,
December 22d, 1913.

In re: #4280/90,

TOKU SAKAI:

Attorney Wm. J. Sheldon appears this date and states that he does not desire to offer any further evidence or testimony in this case, but desires time to file a brief.

Immigrant Inspector.

HBB/JLM. [31]

DEPARTMENT OF COMMERCE AND LABOR,
IMMIGRATION SERVICE.

Office of Inspector in Charge.

Honolulu, Hawaii.

December 18th, 1913.

Mr. Wm. J. Sheldon,
Merchant Street,
Honolulu, T. H.

As attorney in the case of Toku Sakai, you are hereby notified that a further hearing in this case will be had on Monday, December 22d, at 9:30 A. M., at which time any evidence pertinent to the case that you submit will be considered.

Immigrant Inspector. [32]

(COPY)

WARRANT—ARREST OF ALIEN.

Form 561.

UNITED STATES OF AMERICA.

DEPARTMENT OF COMMERCE AND LABOR,
WASHINGTON.

No. 53,678/459-460-1-2-3-4-5.

To RICHARD L. HALSEY, Inspector in Charge,
Honolulu, T. H.

WHEREAS, from evidence submitted to me, it appears that the aliens CHING LUM, SIU JOY, CHUN PIN, WONG YUEN, KWANJIRO HARUTA, HATSUME HARUTA, and TOKU SAKAI, who landed at some unknown port, on the — day of —, have been found in the United States in violation of the Act of Congress approved

February 20, 1907, amended by the Act approved March 26, 1910, for the following among other reasons:

That the said Ching Lum, Siu Joy, Chun Pin, Wong Yuen, and Kwanjiro Haruta are unlawfully within the United States in that they have been found receiving, sharing in, or deriving benefit from the earnings of a prostitute, or prostitutes; and that the said Hatsume Haruta and Toku Sakai are prostitutes and have been found practicing prostitution subsequent to their entry into the United States,

I, LOUIS F. POST, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said aliens and grant them a hearing to enable them to show cause why they should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized payable from the appropriation "Expenses of Regulating Immigration, 1914." Pending further proceedings, the aliens may be released from custody upon furnishing satisfactory bond in the sum of \$1000 each.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 17 day of October, 1913.

(Sgd.) LOUIS F. POST,

Acting Secretary of Commerce and Labor.

Mc.

11-2719. [33]

**Exhibit "A"—Cablegram, Post to Immigration,
Honolulu.**

(COPY)

CABLEGRAM.

"Via Commercial Pacific."

Received at 2.5PM BDN.

OCT. 17, 1913.

37 USG WASHINGTON DC 25

Immigration Honolulu.

ARROW CHING LUM SIU JOY CHUN PIN
WONG YUEN KWANJIRO HARUTA RECEIP-
TOR HATSUME HARUTA AND TOKU SAKAI
PROGNOSIS.

LOUIS Y. POST,
Acting Secretary.

Code:—

ARROW: Arrest following-named alien(s) and
bring before yourself for hearing, forwarding
record of proceedings to the Department.

RECEIPTOR: Alien found receiving, sharing in, or
deriving benefit from a part or the whole of the
earnings of a prostitute.

PROGNOSIS: Alien found practicing prostitution
after entry.

Exhibit "A." [34]

**Testimony of Toku Sakai Before Immigration
Inspector.**

Case No. 4280/90.

UNITED STATES IMMIGRATION SERVICE.

Honolulu, T. H., October 2, 1913.

Examining Inspector—HARRY B. BROWN.

Interpreter—CHOMEI TAJIMA.

Stenographer—CHARLES W. DURKEE, Jr.

Case of Toku Sakai—Prostitute.

Telegraphic warrant of arrest attached as “Exhibit A.”

Alien sworn, testified:

Q. What is your name? A. Toku Sakai.

Q. How old are you? A. Twenty-eight.

Q. Born where?

A. Hiroshima City, Hiroshima Ken.

Q. When did you first come to Hawaii?

A. Meiji 37.

Q. What boat?

A. I forgot the name of the boat.

Q. What is the name of your husband?

A. Segawa Gonjiro.

Q. Where is he now?

A. It is seven years since I separate from him, may be in the United States or may be in Hawaii.

Q. Have you been practicing prostitution?

A. Yes.

Q. How long?

A. About one year and I did before that time.

Q. Well when did you first start in the occupation?

A. About five years ago.

(Alien signed her name in the note-book.)

October 7, 1913.

Interpreter—TOMIZO KATSUNUMA.

Q. What is your name?

A. Toku Sakaye (Sakai).

Q. Do you want a lawyer? A. Yes.

Certified correct.

(Sgd.) CHARLES W. DURKEE, Jr.,

Stenographer. [35]

**Cablegram, Acting Secretary to Immigration
Service, Honolulu.**

CABLEGRAM.

“Via Commercial Pacific.”

Received at 11.32 PM. E.

24 USG WASHINGTON DC 97.

SEP. 29, 1913.

Immigration Service Honolulu.

ARROW KIMI MATSU TAJIU HISAYE
MISUNO ALIAS MASUYE HARUYO CHIYO
WARI TAKA OR TAKE KUMA OR KURA YO-
SHI TANE UME NAKANO CHIYE RIU YU-
KINO OR YUKI TOKU TAKI ITO SATSU
TERU CHISE MURA ASANO KIMI OR
KAMI NATSU MIYA TAMANO KAME TOME
TSUTSNO TAKEYO CHIYONO OR CHIYE
MASU (WIFE OR PARAMOUR OR HIRATA)
MASU (WIFE OR PARAMOUR OF TSUJI)
KIKUYE TAMA YOSHI IGARASHI KAMI
MATSUYE TAKI KIYO CHIYO UTA FUSANO

NARITOMI TOYO TOYOBUKU MASA KEIAN
HIDE TAWARA TERU OGATA MISAC MORI-
AMA AND HATSU PROGNOSIS RELY TEN
EACH.

J. B. DENSMORE,
Acting Secretary.

(Copy.)

Code:—

ARROW: Arrest following-named alien(s) and
bring before yourself for hearing, forwarding
record of proceedings to the Department.

PROGNOSIS: Alien found practicing prostitution
after entry.

RELAY: Authority granted for release from cus-
tody under bond in the sum of ——— hundred
dollars. [36]

[Endorsed]: No. 94. (Title of Court and Cause.)
Amended Return. Filed Mar. 3, 1916. (Sgd.) F. L.
Davis, Clerk. [37]

Order Continuing Cause to March 4, 1916.

From the Minutes of the United States District
Court, Vol. 10, Wednesday, March 1, 1916.

(CLEMONS, Judge Presiding.)

(Title of Court and Cause.)

On this day came Mr. George A. Davis and Mr.
W. T. Rawlins, counsel on behalf of the above appli-
cant, and also came Mr. Horace W. Vaughan, United
States Attorney, on behalf of the respondent herein
and this cause was called for disposition. There-

upon it was by the Court ordered that said cause be continued to March 4, 1916, at 10 o'clock A. M., for disposition. [38]

Final Hearing, Order Discharging Writ of Habeas Corpus and Order Releasing Petitioner on Bond Pending Appeal.

PROCEEDINGS AT DECISION.

From the Minutes of the United States District Court, Vol. 10, Saturday, March 4, 1916.

(CLEMONS, Presiding Judge.)

(Title of Court and Cause.)

On this day came the above applicant in person and with her counsel, Mr. George A. Davis and Mr. W. T. Rawlins, and also came Mr. Horace W. Vaughan, United States Attorney, on behalf of the respondent herein and this cause was called for hearing. Thereupon and after due hearing, the Court ordered that the Writ herein be discharged, to which ruling counsel for the applicant entered an exception and gave notice of appeal, whereupon it was further ordered by the Court that said applicant be released upon the bond heretofore given and that she be allowed fifteen days to perfect her appeal. [39]

Proceedings Had March 4, 1916.

No. 94.

*In the United States District Court, in and for the
Territory of Hawaii.*

Before the Honorable CHARLES F. CLEMONS,
Judge of the said Court.

In the Matter of the Application of TOKU SAKAI
for a Writ of Habeas Corpus.

APPEARANCES FOR PETITIONER:

WILLIAM T. RAWLINS, Esq., and GEORGE
A. DAVIS, Esq., for Respondent.

HORACE W. VAUGHAN, Esq., U. S. District
Attorney.

TRANSCRIPT.

Saturday, March 4, 1916.

Mr. DAVIS.—If your Honor please, we are willing to rely on the record. This case is so plain that it requires no authorities except the matters I will call to your Honor's attention. I refer to the Immigration Authorities as that tribunal. It requires no authorities in this case, and I refer to the statutory tribunal at the Immigration Station, eliminating all personal references to names or anything like that so that there can be no misunderstanding. Now, Section 25 of the Act of March 4, 1913, and amendments—from the only statutory power, and your Honor must admit it is entirely statutory—if your Honor follows me, the power is entirely statutory—

The COURT.—Do you intend to argue that?

Mr. DAVIS.—No, but I want to state it, I am not going to argue it, I don't need to with a court as strong as this is. Section 25 provides that a Board of Special Inquiry consisting [40] of three members have alone jurisdiction vested in it to deport an alien from the Territory of Hawaii or any other part of the United States. I call your Honor's attention to page 15 of this Act, "such Boards . . . shall be deported." There was no Board of Special Inquiry, and we rely on this record—but there is the examining inspector Harry B. Brown, an interpreter and a stenographer, that's all. The statute requires a Board which shall consist of three members, and that alone shall have jurisdiction under this statute to order deportation. Now, then, the following proceedings took place, they are here on this record (reads record) and upon the strength of this they send a telegram recommending deportation of this woman among a number of others. The telegram is attached hereto, and upon the strength of that they issued a warrant for the arrest and deportation of this woman, acting absolutely without jurisdiction because—there it is, that is all, absolutely no jurisdiction; there is no evidence. This is a case that can have but one ending, because there was no jurisdiction and no tribunal in accordance with the statute, and there are no authorities required on that. There is nothing to show in this record where this woman was practicing prostitution. In their hurry they slipped up, they haven't even complied with their own rules. Even if they had according to their own rules they slipped up on this. I call

your Honor's attention to the immigration rules here,—upon the receipt of the warrant of arrest under the heading of Aliens, subsection 4 of rule 22, page 37 . . . “why they should not be deported.” This warrant was directed to Richard L. Halsey, and this woman was not even taken before Halsey but was taken before Harry B. Brown—

The COURT.—What is the subsection of this?

Mr. DAVIS.—Subdivision 1, your Honor and grant a [41] hearing, and so forth. “It is directed to Richard L. Halsey, Inspector in Charge at Honolulu, and to nobody else. There is no other inspector at all about it, and the rule says shall be taken before the person therein described.” The jurisdictional question is vital. This woman was not taken before a Board of Special Inquiry as required by the Immigration Laws and she had no hearing before such Board, and these proceedings are void, and this return is insufficient, and this writ of habeas corpus for once must be allowed to go, and I submit the case to this Honorable Court in the firm belief that upon this record this writ must go and that this is one of the cases where the Immigration authorities have not complied with the laws under which they are acting and which your Honor—because that is the sole authority, there is none other, and I submit this case.

The COURT.—All it says is Immigration, Honolulu.

Mr. RAWLINS.—That is Richard L. Halsey.

Mr. VAUGHAN.—If your Honor please, I don't

wish to take up the time of this Court, but this record is right. There is no necessity for the convening of a Board of Special Inquiry except where it is to be determined whether or not an arriving alien is endeavoring to enter—rather shall be permitted to enter. A Board of Special Inquiry in that case is called by Section 25. Section 25 regulates Boards of Special Inquiry with reference to arriving aliens, and that such Board of Special Inquiry shall be appointed by the Commissioner of Immigration at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provision of law, which Board shall consist of three members who shall be selected, and so forth.

Mr. DAVIS.—We specifically controvert that proposition.

Mr. VAUGHAN.—Section 3 of this Act provides, amongst other things, “any alien who may be found an inmate of or connected [42] with houses of prostitution deported in the manner provided by Sections 20 and 21 of this Act.” Now, let’s see what these Acts provide. Sections 20 and 21, not 25, “that any alien who shall enter the United States in violation of the law and Section 21, “that in case the Secretary of Labor shall be satisfied shall be punished and so forth.” I will read rule 22 which is prescribed by the Secretary of Labor to make regulations for the enforcement of this Act, “the officers shall make thorough investigation citing Sections 20, 21, 18, 35, 36, 2, 3, and Executive Order of March 14, 1914, “all such cases by whom-

soever discovered application follow by mail, and so forth,” and “upon the receipt of warrant of arrest the alien shall be taken before the person or persons therein described as to whether warrant for deportation shall issue.”

Mr. DAVIS.—Yes, but your Honor—

Mr. VAUGHAN.—Mr. Davis, just let me talk, if you please.

The COURT.—Mr. Davis, I will not stand this any longer.

Mr. VAUGHAN.—I will read the warrant of arrest which is attached here. This is directed to the Immigration Service at Honolulu, to the Immigration service in Honolulu. The warrant of arrest is not direct to Mr. Halsey but to the Immigration Service here at Honolulu, and signed by the Acting Secretary. She was given a hearing, if the Court please, before one of the examining inspectors which is in accordance with the rules and regulations of the department because this proceeding was under sections 3, 20 and 21, and not under 25. Absolutely the only irregularity about the warrant of arrest was the fact that it spelled the applicant's name as Takai instead of Sakai. The warrant of arrest is for the name given in the warrant—Taku Takai instead of Taku Sakai. We allege that was the party meant. Now, then, [43] after the exclusion of this alien on October 2d before the examining inspector Harry B. Brown the case of Taku Sakai was taken up; the alien was sworn and she testified: “When did you first come to Honolulu?” “Meiji 37.” She admits in this hearing that she had been practicing prosti-

tution and did so for one year prior to that time. It was for the immigration officials to determine whether or not they had proof that she had been practicing prostitution. It was for the Immigration officials whether or not the testimony showed that she had been practicing prostitution a year before this hearing. Is there any evidence here from which they could conclude that she had been practicing prostitution for a year previous to that time? Her admission is that she had been practicing prostitution for a year, and had come to Hawaii and had been in Hawaii since Meiji 37.

The COURT.—I will stop the argument on that. Now, about the necessity of having it heard before a Board.

Mr. VAUGHAN.—If your Honor please, they undertake to act under Section 3, and get evidence to present to the Secretary of Labor. The examining inspector makes no findings, the Secretary of Labor makes the finding in these matters.

The COURT.—I was trying to find a decision, one of Mr. Cathcart's cases.

Mr. VAUGHAN.—After the examination by Inspector Brown—he is acting not for the purpose of determining the matter himself but for the purpose of gathering evidence upon which the Secretary of Labor may act.

The COURT.—Is there any necessity for a vote of the Board?

Mr. VAUGHAN.—No. I can cite your Honor a half a dozen or more cases in the Federal Reporter

where the hearing was held before the Inspector.
[44]

The COURT.—This is Bouve on Aliens, 626–627.

Mr. DAVIS.—I wish to read from 208 Fed. Reporter, page 12. It shows a want of good faith, your Honor.

The COURT.—Where is the want of good faith, Mr. Davis?

Mr. DAVIS.—The want of good faith is that the hearing didn't take place before the person designated in the warrant, and no higher evidence of want of good faith could be shown. They haven't complied with their own rules which have the force of the statute.

The COURT.—Hold on, don't read that any more. Just a minute, if you are going to read something—

Mr. DAVIS.—I am reading this *bona fide* hearing; your Honor don't care to hear it at all, maybe. There is the case. The proof should be the best that can be obtained. They made it, we didn't.

The COURT.—Aren't they to be the judges of that, Mr. Davis?

Mr. DAVIS.—No, not if it isn't *bona fide*, but taken in connection with the fact that the hearing was not as designated by law.

The COURT.—The Secretary of Labor didn't care who heard the testimony so long as he was a reliable man, and the presumption is that an officer of the Government is a reliable man, and he didn't care who took the testimony.

Mr. DAVIS.—Yes, but the Secretary had no right

to issue such a warrant, your Honor, because the rules say so, "when he issued the warrant of arrest then the alien must be taken before, and so forth and so forth," and before he could issue that warrant of deportation these rules had to be complied with, and I don't care what the Secretary of Labor—whether he didn't care before whom the hearing was or not, but we care. The first hearing wasn't a hearing before the officer designated in the [45] warrant and the proof wasn't the best to be obtained. Nowhere was Harry B. Brown mentioned, and a hearing without a finding is not a hearing.

The COURT.—I will stop you. You claim this evidence was taken before the wrong person, namely, Harry B. Brown. This evidence before Brown on October 2, 1913, and the warrant of arrest was October 17, 1913. This is only preliminary evidence. Now then, the law reads, "Upon the receipt should not be deported." Then here is the letter to the attorney and he had his opportunity to show cause why she should not be deported.

Mr. DAVIS.—Was that hearing held?

The COURT.—He evidently didn't desire it, Mr. Sheldon didn't.

Mr. DAVIS.—If your Honor please, that doesn't make any difference, they have got to have a hearing. Never mind about Sheldon.

The COURT.—On December 22, 1913, Mr. Sheldon states he doesn't desire to offer any further evidence or testimony in this case but desires time to file a brief. Then on March 12, 1913, nearly three months afterwards, he states he doesn't desire to

file a brief or do anything further in the case. So, Mr. Davis, all of your argument falls to the ground, because that evidence she gave was a hearing before the warrant issued at all. The record also shows that she was given an opportunity to show cause.

Mr. DAVIS.—She never waived her hearing. I take the position that there never was a hearing, and she never waived any hearing.

The COURT.—I agree with you there, but there was an offer of a hearing.

Mr. RAWLINS.—Here is the cablegram by way of the Commercial Pacific, received at 11:32 P. M. . . . addressed Immigration [46] Service, Honolulu, arrow Toku Takai and nowhere in that telegram is there any warrant to arrest Toku Sakai,—

The COURT.—I will stop you there, because after that direction issued she was examined and knew the warrant was for her arrest.

Mr. RAWLINS.—What authority do the immigration people have to arrest this woman? There was no direction to them to arrest this woman, and they are guilty of false imprisonment when they take this woman in without authority.

The COURT.—Granted they were, but the law says that any person who admits being a prostitute shall be deported.

Mr. RAWLINS.—And on the 2d day of October, if your Honor please, Harry Brown has this purported hearing based on what?

The COURT.—In that hearing, whether lawful or unlawful, she admitted she was a prostitute, and we

don't care where she admitted it,—

Mr. DAVIS.—Nothing of the kind.

The COURT.—And the record also shows that on December 18th Mr. Sheldon was written a letter saying he had this opportunity to present any further evidence, but he didn't embrace it.

Mr. DAVIS.—But the woman isn't bound by it.

The COURT.—I don't think any further discussion will be proper, Mr. Davis, I am going to decide this right now.

Mr. DAVIS.—Then give us a chance to appeal to the United States Circuit Court of Appeals.

The COURT.—You may.

Mr. DAVIS.—With all deference to your Honor, give us a chance, and give us reasonable time.

The COURT.—Please sit down, Mr. Davis. The writ is discharged and the prisoner remanded.

Mr. DAVIS.—To which ruling and decision I respectfully except. I ask your Honor to make a reasonable bond. [47]

Mr. RAWLINS.—She is living a decent, respectable life, your Honor.

The COURT.—I will call on Mr. Farmer.

Mr. FARMER.—I don't know just now.

Mr. VAUGHAN.—My information, your Honor, from Mr. Halsey is that she is not misbehaving.

The COURT.—She may be released on the same bond as before.

Mr. DAVIS.—I ask for \$250.00.

The COURT.—With the understanding that her appeal is perfected within fifteen days. The bond is \$250.00. If the appeal is not perfected in fifteen

days the ruling will be made absolute. This bond is sufficient.

I hereby certify that the foregoing is a full, true and correct transcript of my shorthand notes in the above entitled case.

(Sgd.) H. F. NIETERT.

Honolulu, H. T., March 13, 1916.

[Endorsed]: No. 94. (Title of Court and Cause.) Transcript. Filed Mar. 23, 1916. George R. Clark, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.

[48]

In the United States District Court for the Territory of Hawaii.

No. 94.

In the Matter of the Application of TOKU SAKAI
for a Writ of Habeas Corpus.

March 4, 1916.

[49]

Opinion.

This case, in which the writ of habeas corpus issued, has been submitted on the record, including not only the record of proceedings before the immigration officers and before the Secretary of Labor, but also the verified petition of the alien and the verified return of the respondent, the immigration inspector in charge at the port of Honolulu and his verified amended return having thereto annexed the transcript of record of proceedings in the whole matter of the alien's arrest as a deportable alien and of the hearing and consideration pursuant to the warrant authorizing arrest.

The petitioner's counsel claim that she did not, as alleged by the Government, admit having practiced prostitution in the United States, but that in her examination there was nothing showing where she had so practiced. But her testimony was that she had "been practicing prostitution" "about one year and before that time" (Transcript 2), and her petition (page 1, par. I) shows she had been a resident of this Territory for eleven years before her arrest. The consequent inference is that she was in the Territory at the time of her unlawful act, and that inference is an additional reason why the finding of the Secretary of Labor should not be disturbed. See *In the matter of Chiyo Kajikami* (No. 92), decided Feb. 21, 1916; *In the matter of Eitaro Yamada* (No. 97), decided Feb. 16, 1916.

The fact that the alien is named "Toku Taki" in the preliminary telegraphic order for her arrest, is immaterial. In subsequent proceedings and orders her name was given, as here given, "Toku Sakai." And, to meet an argued contention, it does not matter that the prejudicial admission which the alien made was made in an investigation had pursuant to that order in which she was differently named. This alien was the person who made the admission and it stands against her, and [50] the immigration department rightly took advantage of it, whatever her name might be; her identity, not her name, is the important thing.

The ground of want of counsel and the other grounds of objection to the deportation proceedings,

are insufficient to justify the petitioner's release from custody.

Let the writ be discharged and the petitioner remanded to the custody of the respondent.

(Sgd.) CHAS. F. CLEMONS,

Judge of the United States District Court for the Territory of Hawaii.

[Endorsed]: No. 94. (Title of Court and Cause.) Decision. Filed Mar. 4, 1916. F. L. Davis, Clerk. By (Sgd.) Ray B. Rietow, Deputy Clerk. [51]

In the United States District Court for the Territory of Hawaii.

No. 94.

In the Matter of the Application of TOKU SAKAI for a Writ of Habeas Corpus.

Decree.

This case having been heard and submitted to the Court for determination, and the Court having rendered its decision unfavorably to the petitioner,—

Now, therefore, it is hereby ORDERED, ADJUDGED and DECREED that the writ of habeas corpus heretofore issued out of this court in this case be, and it is hereby, discharged and the petitioner remanded to the custody of the respondent inspector in charge of the United States immigration station at the port of Honolulu.

Done at Honolulu this 4th day of March, A. D. 1916.

(Sgd.) CHAS. F. CLEMONS,

Judge of the United States District Court for the Territory of Hawaii.

[Endorsed]: No. 94. (Title of Court and Cause.)
Decree. Entered in J. D. Book #2, folio 699. Filed
Mar. 6, 1916. F. L. Davis, Clerk. By (Sgd.) Wm.
L. Rosa, Deputy Clerk. [52]

**Order Extending Time to March 25, 1916, to Perfect
Appeal.**

From the Minutes of the United States District
Court, Vol. 10, Thursday, March 16, 1916.
(CLEMONS, Presiding Judge.)

(Title of Court and Cause.)

On this day came Mr. George A. Davis and Mr.
W. T. Rawlins, counsel for the above applicant and
also came Mr. Horace W. Vaughan, United States
Attorney, counsel on behalf of the respondent
herein, and this cause was called in re extension of
time to perfect appeal. Thereupon on motion of
Mr. Rawlins and consent of Mr. Vaughan, it was by
the Court ordered that the time previously set for
March 19, 1916, be extended to March 25, 1916.
[53]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

No. 94.

In the Matter of the Application of TOKU SAKAI
for a Writ of Habeas Corpus.

On Appeal to the Circuit Court of Appeals for the
Ninth Judicial Circuit of the United States.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, TOKU SAKAI, petitioner appellant in the above-entitled cause, as principal, and S. Adachi and I. Takano, of Honolulu, City and County of Honolulu, in the Territory of Hawaii, Real Estate Agents, as sureties, are held and firmly bound unto Richard L. Halsey, United States Immigration Inspector in Charge, in the sum of FIVE HUNDRED DOLLARS (\$500.00), lawful money of the United States, to be paid to the aforesaid Richard L. Halsey, United States Immigration Inspector in Charge, his respective executors, successors, administrators and assigns, to which payment well and truly to be made, we bind ourselves and each of us, our and each of our respective heirs, administrators, executors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Honolulu, City and County of Honolulu, in the Territory of Hawaii, this 23d day of March, A. D. 1916.

WHEREAS, the above-bounded TOKU SAKAI petitioner-appellant has appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, from the final order and judgment dismissing the writ of [54] habeas corpus issued in this proceedings, and remanding the petitioner-appellant into the custody of Richard L. Halsey, United States Immigration Inspector in Charge at the Port of Honolulu, in the District and Territory of Hawaii, made and entered

up by and in said court on the 23d day of March, A. D. 1916, in the above entitled proceedings, by the above-entitled court, and praying that said judgment and order and each of them may be reversed;

NOW, THEREFORE, the condition of this obligation is such that if the above-named TOKU SAKAI petitioner-appellant, aforesaid, shall prosecute her appeal to effect and shall answer all damages and costs to which the said Richard L. Halsey, United States Immigration Inspector in Charge, may be entitled, if she fail to make her appeal good, then this obligation shall be void, otherwise the same shall remain in full force and effect.

IN WITNESS WHEREOF, the aforesaid principal and the aforesaid sureties have hereunto set their hands and seals at Honolulu, City and County of Honolulu, District and Territory of Hawaii, this 23d day of March, A. D. 1916.

Signed in Japanese:

TOKU SAKAI, (Seal)

Principal.

Witness:

(Sgd.) WM. L. ROSA.

(Sgd.) S. ADACHI, (Seal)

(Sgd.) I. TAKANO, (Seal)

Sureties.

The foregoing bond is approved as to form, amount and sufficiency of sureties.

Dated, Honolulu, Hawaii, March 23d, 1916.

(Sgd.) CHAS. F. CLEMONS,

Judge, United States District Court, Territory of Hawaii. [55]

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

S. Adachi and I. Takano, being severally sworn, say; the said S. Adachi, that he resides at Honolulu, in the Territory of Hawaii, and is worth the sum of more than ONE THOUSAND DOLLARS in property, not by law exempt from execution, over and above all his debts and liabilities; and the said I. Takano, that he resides in Honolulu, in the Territory of Hawaii, and is worth the sum of more than ONE THOUSAND DOLLARS, in property not by law exempt from execution, over and above all his debts and liabilities.

(Sgd.) S. ADACHI.

(Sgd.) I. TAKANO.

Subscribed and sworn to by the said S. Adachi and I. Takano, before me this 23d day of March, A. D. 1916.

(Seal) (Sgd.) RAY B. RIETOW,
Deputy Clerk, U. S. District Court, Territory of
Hawaii.

[Endorsed]: No. 94. (Title of Court and Cause.)
Bond on Appeal. Filed Mar. 23, 1916. George R.
Clark, Clerk. By (Sgd.) Ray B. Rietow, Deputy
Clerk. [56]

*In the District Court of the United States in and for
the Territory of Hawaii.*

OCTOBER, A. D. 1916, TERM.

NO. 94.

In the Matter of the Application of TOKU SAKI
for a Writ of Habeas Corpus.

Petition for Allowance of Appeal and for Appeal.

To the Honorable CHARLES F. CLEMONS Judge
of the District Court of the United States for
the Territory of Hawaii.

TOKU SAKI, the petitioner herein, by her attorneys, George A. Davis, William T. Rawlins and Charles S. Davis, conceiving herself aggrieved by the final order and decree made and entered up in this proceeding and cause on the 4th day of March, A. D. 1916, does hereby appeal from the said final order and decree to the Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, and files herewith her assignment of errors intended to be urged and relied upon upon appeal, and she prays that her appeal may be allowed and that a transcript of the record of all proceedings and papers upon which said final order and decree was made, duly authenticated may be sent to the Circuit Court of Appeals for the Ninth Judicial Circuit of the United States.

Dated this 23d day of March, A. D. 1916.

(Sgd.) GEO. A. DAVIS,

(Sgd.) WILLIAM T. RAWLINS,

(Sgd.) CHARLES S. DAVIS,

Attorneys for Petitioner Toku Saki Appellant.

Received a copy of the above petition.

(Sgd.) HORACE W. VAUGHAN,
United States District Attorney. [57]

[Endorsed]: No. 94. (Title of Court and Cause.)
Petition for Allowance of Appeal. Filed Mar. 23,
1916. George Clark, Clerk. By (Sgd.) Wm. L.
Rosa, Deputy Clerk. [58]

*In the District Court of the United States in and for
the Territory of Hawaii.*

OCTOBER, A. D. 1916, TERM.

NO. 94.

In the Matter of the Application of TOKU SAKI
for a Writ of Habeas Corpus.

Order Allowing Appeal.

Upon the application and motion of George A.
Davis, one of the counsel for the above-named peti-
tioner,—

It is hereby ordered that the petition for appeal
heretofore filed herein by the petitioner, Toku Saki,
be and the same is hereby granted and allowed and
that an appeal to the United States Circuit Court of
Appeals for the Ninth Judicial Circuit from the final
order and decree heretofore made, to wit, on the 4th
day of March, A. D. 1916, filed and entered herein
be and the same is hereby allowed and that a tran-
script of the record of all proceedings and papers
upon which said final order and decree was made duly
certified and authenticated be transmitted under the
hand and seal of the clerk of this court to the United

States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States at San Francisco in the State of California.

Dated this 23d day of March, A. D. 1916.

(Sgd.) CHAS. F. CLEMONS,
Judge of the District Court of the United States for
the Territory of Hawaii.

[Endorsed]: No. 94. (Title of Court and Cause.)
Order Allowing Appeal. Filed Mar. 23, 1916.
George R. Clark, Clerk. By (Sgd.) Wm. L. Rosa,
Deputy Clerk. [59]

*In the District Court of the United States in and for
the Territory of Hawaii.*

OCTOBER, A. D. 1916, TERM.

NO. 94.

In the Matter of the Application of TOKU SAKI
for a Writ of Habeas Corpus.

Assignment of Errors.

Toku Saki, the petitioner in the above-entitled cause and proceeding and appellant herein, having petitioned for an order from said court permitting her to appeal from the final order and decree of the District Court of the United States for the Territory of Hawaii entered up herein on the 4th day of March, A. D. 1916, wherein it was ordered, adjudged and decreed that the writ of habeas corpus issued herein out of this court be discharged and the petitioner remanded to the custody of the respondent therein inspector-in-charge of the United States Immigration

Station at the Port of Honolulu, now makes and files with this her petition the following assignment of errors herein, upon which she will apply for a reversal of said order and final decree dismissing and discharging said writ of habeas corpus and remanding said petitioner to the custody of Richard L. Halsey, United States Immigration Inspector-in-Charge at the Port of Honolulu, District and Territory of Hawaii, and which said errors and each and every one of them are to the great detriment, injury and prejudice of the said petitioner and in violation of the rights conferred upon her by law; and she says that [60] in the record and proceedings in the above-entitled cause and proceeding, upon the hearing and determination thereof in the District Court of the United States for the Territory of Hawaii, there is manifest error in this, to wit:

1. That the findings, final order and decree made and entered by the District Court of the United States in and for the Territory of Hawaii and by the Honorable Charles F. Clemons, the Judge presiding in said court, and made and entered herein on the 4th day of March, A. D. 1916, was and is erroneous and contrary to law and not warranted by the record, evidence and proceedings, and was and is in violation of the Constitutional rights of this petitioner, and appellant.

2. The Court erred in holding and deciding that the writ of habeas corpus issued herein should be dismissed and discharged and the petitioner remanded to the custody of the respondent inspector-in-charge of the United States Immigration Station at the

Port of Honolulu for the purpose of being deported to Japan, because said petitioner was not taken before the person described in the warrant of arrest issued on the 17th day of October, A. D. 1913, in violation of Rule 22 of the Immigration Rules of November the 15th, 1911, Subdivision IV, which said rules were adopted by and in full force, and under which the Department of Commerce and Labor of the United States of America and the Department of Immigration were acting and from which and by which Richard L. Halsey, inspector-in-charge of the immigration station of the United States at the port of Honolulu, claimed to hold and have the custody of the body of this petitioner, and which said rules were made and established by the Commissioner General of Immigration of the United States under the provisions of Section 22 of the Act of Congress of February 20th, 1907, as amended by the Acts of March 26, 1910, and March 4, 1913, entitled "An Act to Regulate the Immigration of Aliens into the United States." [61]

3. The Court erred in making said final order and decree remanding this petitioner to the custody of said inspector-in-charge and dismissing said writ of habeas corpus because it nowhere appears that this petitioner was allowed to inspect the warrant of arrest and all the evidence upon which it was issued, nor was your petitioner apprised at any time before the hearing had before Examining Inspector Harry B. Brown, which said hearing was held in violation of Subsection IV of Rule 22 of said Immigration Rules, that she could be represented by counsel, and

it does not appear that this petitioner was required to state then and there whether she desired counsel or waived her right thereto, and that it nowhere appears on said record of said hearing before said Inspector Harry B. Brown that she made any reply as to whether she desired counsel or not or whether she waived her right thereto, and no such reply is entered on the record as required by said Rule 22 Subdivision 4 (B) Immigration Rules.

4. That the petitioner was entitled to be discharged from custody by the said United States District Court because the record discloses that she did not have a fair and *bona fide* hearing before Richard L. Halsey, inspector-in-charge at the port of Honolulu, as required by said Rule 22, Subdivision 4 (a), the said Richard L. Halsey being the person designated and described in the warrant of arrest issued against your petitioner on the 17th of October, 1913, by Louis F. Post, acting secretary of commerce and labor.

5. That your petitioner was entitled to be discharged by said United States District Court because the record fails to show that she had any lawful, fair and *bona fide* hearing before any person or persons authorized and empowered by the said Immigration Act of February 20th, 1907, as amended by the Acts of March the 26th, 1910, and March the 4th, 1913, and the immigration rules authorized by said act and under which said law and rules the said Richard L. Halsey, said inspector-in-charge of the United States Immigration [62] Station at the port of Honolulu, claimed to hold the body of the petitioner herein.

6. That it appears from the record that the petitioner was entitled to be discharged by the United States District Court on the 4th of March, 1916, at said final hearing, because the said petitioner was not legally held by the said respondent, Richard L. Halsey, inspector-in-charge of the United States Immigration Station at the port of Honolulu, or of any other person or official of the United States Immigration claiming to hold and imprison her under the authority of the immigration laws and rules of the United States and under the act hereinbefore referred to.

7. That the record shows that this petitioner was entitled to her discharge by the District Court of the United States at the final hearing on the 4th of March, A. D. 1916, because no opportunity was afforded her to have the assistance of counsel for her defense at the hearing before Examining Inspector Harry B. Brown on the 2d of October, 1913, and the 7th of October, 1913, in violation of and contrary to the provision of art. VI of the articles in addition to an Amendment of the Constitution of the United States.

8. That it appears from the record that the petitioner was deprived of her liberty by said Richard L. Halsey, the inspector-in-charge at the port of Honolulu, without due process of law and in violation of Article 14 of the Articles in Addition to and Amendment of the Constitution of the United States of America and the District Court of the United States erred in dismissing and discharging said writ

of habeas corpus on the 4th day of March, A. D. 1916.

9. The petitioner was entitled to be discharged from custody under said writ of habeas corpus because it appears from the face of said record upon which the respondent relied that the petitioner [63] was illegally imprisoned and restrained of her liberty by Richard L. Halsey, inspector-in-charge of the United States immigration station at the port of Honolulu, in violation of law, without authority of law and because there was no evidence offered or given at the hearing of October the 2d, 1913, and October the 7th, 1913, before Examining Inspector Harry B. Brown, or any person authorized to hold any hearing, that this petitioner had practiced prostitution in the United States or in the Territory of Hawaii within the meaning of Section 3 of the Act of February 20th, 1907, as amended by the acts of March the 26th, 1910, and March the 4th, 1913, entitled "An Act to Regulate the Immigration of Aliens into the United States," and under the provisions of which said section and act the respondent claimed to hold said petitioner, and under which the warrant of deportation dated the 28th day of March, 1914, was issued and said petitioner was illegally in custody.

10. That the evidence taken at said hearings of October 7, 1913, and October 2d, 1913, had before Examining Inspector Harry B. Brown in violation of Rule 22 of the Immigration Rules, does not show when, where and with whom and under what circum-

stances, nor that said petitioner had ever practiced prostitution in the United States, and said petitioner was entitled to be discharged by said United States District Court at the final hearing on March the 4th, 1916, and said United States District Judge erred in dismissing said writ of habeas corpus and refusing to discharge said petitioner.

11. That the warrant of deportation of this petitioner was unlawfully and improperly issued, because there was and is no evidence disclosed by the record establishing or tending to establish that the petitioner had violated any of the section of the act to regulate the immigration of aliens into the United States, and was unlawfully in custody of the respondent Richard L. Halsey, and said United States District Court erred in not discharging her from custody. [64]

12. That the return and amended return of Richard L. Halsey, inspector-in-charge of the immigration station at the port of Honolulu, filed in said court and the amended return filed in said court to the writ of habeas corpus issued herein is wholly insufficient in law and is not supported by the evidence given at said hearing before Examining Inspector Harry B. Brown as appears from the record, and the Court erred in dismissing said writ of habeas corpus and remanding the petitioner to the custody of the respondent inspector-in-charge and in refusing to discharge her, the said petitioner.

13. That there was no evidence adduced or given at said hearing before Inspector Harry B. Brown nor at any hearing before the United States District

Court to support the allegations of the return and amended return to the writ of habeas corpus issued herein of the respondent Richard L. Halsey.

14. That the said return and amended return of Richard L. Halsey to the writ of habeas corpus issued herein was and is wholly insufficient, and the order and decree dismissing said writ of habeas corpus was and is erroneous.

15. That the record discloses that at said hearings before said Harry B. Brown the petitioner Toku Saki was the only witness examined, and that she was sworn and compelled to testify and to be a witness against herself in violation of Article V of the Constitutional Amendments.

16. That the record discloses that the petitioner was not informed of the nature and cause of the accusation against her nor had she the assistance of counsel, nor was she given the right to obtain witnesses in her favor nor to have process for obtaining such witnesses issued, and was sworn by said Examining Inspector Harry B. Brown and compelled to be a witness against herself in violation of the articles in addition to and amendment of the Constitution of the United States of America, to wit, Articles V and VI. [65]

17. That said proceedings before said Examining Inspector Harry B. Brown were illegal and invalid and in violation of law and of the Act of Congress of February 20th, 1907, as amended by the Acts of March 26, 1910, and March the 4th, 1913, and the warrant of deportation and the warrant of arrest

were illegally issued, and the petitioner was unlawfully arrested under said warrant and unlawfully held in custody under said warrant, and said United States District Court erred in refusing to discharge said petitioner and in dismissing said writ of habeas corpus.

18. The United States District Court and the presiding Judge thereof erred in other particulars appearing upon the record in this cause and proceeding.

AND WHEREAS, by the law of the land the said writ of habeas corpus should not have been dismissed and the said petitioner therein should have been discharged from custody and not remanded to the custody of the respondent Richard L. Halsey, inspector-in-charge of the immigration station of the United States at the port of Honolulu.

AND NOW the said Toku Saki prays that the final order and decree of March 4th, A. D. 1916, hereinbefore referred to, may be reversed, annulled and held for naught, and that she, the said petitioner, may be discharged from custody and may have such other and further relief as may be lawful in the premises.

Dated at Honolulu the 23d day of March, A. D. 1916.

(Sgd.) GEO. A. DAVIS,

(Sgd.) WILLIAM T. RAWLINS,

(Sgd.) CHARLES S. DAVIS,

Attorneys for Petitioner Appellant Toku Saki.

Due service and receipt of a copy of the within

assignment of errors is hereby admitted this 23d day of March, A. D. 1916.

(Sgd.) HORACE W. VAUGHAN,
Acting United States District Attorney. [66]

[Endorsed]: No. 94. (Title of Court and Cause.)
Assignment of Errors. Filed Mar. 23, 1916. George
R. Clark, Clerk. By (Sgd.) Wm. L. Rosa, Deputy
Clerk. [67]

*In the District Court of the United States in and for
the Territory of Hawaii.*

October, A. D. 1916 Term.

No. 94.

In the Matter of the Application of TOKU SAKI
for a Writ of Habeas Corpus.

Citation on Appeal.

United States of America—ss.

The President of the United States, to the United
States of America and to Richard L. Halsey,
Inspector-in-Charge of the Immigration Station
of the United States at the Port of Honolulu,
Greeting:

You are hereby cited and admonished to be and
appear at a United States Circuit Court of Appeals
for the Ninth Judicial Circuit to be holden at the
city of San Francisco, in the State of California,
within thirty days from the date hereof, pursuant
to an order allowing an appeal filed in the clerk's
office of the United States District Court for the
Territory of Hawaii, wherein Toku Saki is appellant

and the United States of America and you, and said Richard L. Halsey, Inspector-in-Charge of the Immigration Station of the United States at the Port of Honolulu, are appellees, to show cause, if any there be, why the final order and decree in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 23d day of March, in the year of our Lord one thousand nine hundred and sixteen, and the one hundred and fortieth year of the Independence of the United States of America.

CHAS. F. CLEMONS,
Judge of the District Court of the United States for
the Territory of Hawaii. [68]

[Seal] Attest: GEORGE R. CLARK,
Clerk of the United States District Court for the
Territory of Hawaii.

Due service of the within citation admitted this
23d day of March, A. D. 1916.

HORACE VAUGHAN,
Acting United States District Attorney. [69]

[Endorsed]: In the District Court of the United States for the Territory of Hawaii. In the Matter of the Application of Toku Saki for a Writ of Habeas Corpus. Citation on Appeal. G. A. Davis, W. T. Rawlins and Charles S. Davis, Counsel for Appellant. Bank of Hawaii Building. Honolulu, T. H. Mar. 23, 1916. George R. Clark, Clerk. By Wm. L. Rosa, Deputy Clerk.

*In the District Court of the United States in and for
the Territory of Hawaii.*

No. 94.

In the Matter of the Application of TOKU SAKI
for a Writ of Habeas Corpus.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court.

You will please prepare transcript of the record in this cause and proceeding to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following pleas, proceedings and papers on file, to wit:

1. The petition for a writ of habeas corpus.
2. The writ of habeas corpus and return of service.
3. The return of Richard L. Halsey, inspector-in-charge of the United States Immigration Station at the Port of Honolulu.
4. The amended return of Richard L. Halsey, inspector-in-charge of the Immigration Station of the United States at the Port of Honolulu, and certain papers and documents and letters attached to said amended return.
5. The warrant of deportation of the alien dated the 28th day of March, A. D. 1914, and signed by J. B. Densmore, Acting Secretary of Commerce and Labor.
6. The warrant of arrest of said alien dated the 17th day of October, A. D. 1913, and signed by Louis

F. Post, Acting Secretary of Commerce and Labor.
[70]

7. The transcript of the proceedings in the case of Toku Saki had and taken before examining inspector, Harry D. Brown, on October 2d, 1913 and October 7, 1913, and certified as correct by Charles W. Durkee, Jr., stenographer, and that certain cablegram in cipher, dated September 29th, 1913, and signed by J. B. Densmore, acting secretary.

8. The recognizance filed herein.

9. The final decree and judgment filed herein, dated the 4th day of March, A. D. 1916.

10. Petition for appeal filed herein March the 23d, A. D. 1916.

11. Assignment of errors filed herein March the 23d, A. D. 1916.

12. Order granting and allowing appeal filed March the 23d, A. D. 1916.

13. The transcript of the proceedings had and taken before the Honorable Charles F. Clemons, Judge of said Court, on Saturday, March the 4th, A. D. 1916, including the shorthand notes taken by the official stenographer of said court so certified by him on the 13th of March, 1916.

14. The citation herein issued and filed March 23d, 1916.

15. The minutes of the clerk of said court containing all entries, memorandums and other matters in the above-entitled cause and proceedings.

16. This praecipe for transcript. The said transcript to be prepared as required by law and the rules of this Court and the rules of the United States

Circuit Court of Appeals for the Ninth Judicial Circuit, and filed in the office of the clerk of said Circuit Court of Appeals at San Francisco before April 23d, A. D. 1916.

Dated at Honolulu, District of Hawaii the 23d day of March, A. D. 1916.

(Sgd.) GEO. A. DAVIS, [71]

(Sgd.) WILLIAM T. RAWLINS,

(Sgd.) CHARLES S. DAVIS,

Attorneys and Counsel for the Petitioner.

[Endorsed]: No. 94. (Title of Court and Cause.) Praecipe for Transcript. Filed Mar. 23, 1916. George R. Clark, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [72]

*In the United States District Court in and for the
District and Territory of Hawaii.*

No. 94.

In the Matter of the Application of TOKU SAKAI
for a Writ of Habeas Corpus.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
District of Hawaii,—ss.

I, George R. Clark, Clerk of the District Court of the United States for the District of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 73, inclusive, to be a true and complete transcript of the record of proceedings had in said court in the matter of the application of Toku Sakai

No. 2794

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

TOKU SAKAI,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

GEO. A. DAVIS,

WILLIAM T. RAWLINS,

CHARLES S. DAVIS,

Attorneys for Appellant.

Upon Appeal from the United States District Court
for the Territory of Hawaii.

Filed

AUG - 8 1908

F. D. Monckton,

United States Circuit Court of Appeals

NINTH CIRCUIT, DISTRICT OF CALIFORNIA

TOKU SAKAI,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

} No. 2794

BRIEF OF APPELLANT

This is an appeal from the final decree of the United States District Court, for the Territory of Hawaii, made on March 4, 1916, discharging the writ of habeas corpus of Appellant, TOKU SAKAI, theretofore issued out of that court, and remanding Appellant to the custody of the respondent in that habeas corpus proceeding, the inspector in charge of the United States Immigration Station at the port of Honolulu. Appellant claims by proper exceptions and assignments of error that the said decree of the United States District Court for the Territory of Hawaii, should be reversed and Appellant dis-

charged from custody under her said writ of habeas corpus for the following reason:—

(1.)

APPELLANT WAS DENIED DUE PROCESS OF LAW IN THAT—

1. *She was given no hearing at all before the Immigration Authorities at the port of Honolulu, under the Constitution and Laws of the United States and the Immigration Rules.*
2. *She was given only the semblance of a hearing before the Immigration Authorities at the port of Honolulu, under said laws and rules.*

We will consider these propositions in their order :

1. *There was no hearing at all given Appellant and she was therefore denied due process of law.*

The deportation of Appellant is sought under the Act of Congress approved February 20, 1907, amended by the Act of Congress approved March 26, 1910. (34 Stat. 898 and 36 Stat. 263.)

Appellant is said to have violated Sec. 3 of this act in that she is an alien and has been found practicing prostitution after her entry into the United States. Sec. 3 provides inter alia :

“Any alien who shall be found * * * practicing prostitution after such alien shall have entered the United States * * * shall be deemed to be

unlawfully within the United States, and shall be deported in the manner provided by sections twenty and twenty-one of this Act."

Secs. 20 and 21 provide to some extent for the procedure in these cases. Under Sec. 20 the alien can be taken into custody "*upon the warrant of the Secretary of Labor and deported to the country whence he came.*" Sec. 21 refers back to Sec. 20.

Further procedure in these cases is provided for by Rule 22 of "Immigration Rules" established by the Commissioner General of Immigration under Sec. 22 of "The Immigration Act" above mentioned. It is submitted that under these laws and rules in order to constitute due process, there must be

A. A HEARING.

And in order to have a hearing there must be—

- (a) A valid warrant of arrest.
- (b) Arrest of the alien under that warrant.
- (c) A bringing of that alien before the administrative officer named in the warrant.
- (d) Evidence produced and offered before that administrative officer.
- (e) A finding or decision by such administrative officer actually made and based upon that evidence.

(a) In Appellant's case there was no warrant of arrest until some time at or after October 17, 1913. The only warrant of arrest which appears on the record bears that date, and the record is silent as to

the date of its arrival at Honolulu, and as to the carrying out of its commands. (See pp. 26-27 Trans.) Prior to that date, on October 2, 1913, Appellant was taken into custody or in some way brought before Examining Inspector Harry B. Brown, was sworn and her testimony taken, and this procedure was repeated on October 7, 1913. (See pp. 29-30 Trans.) All of this was done upon what is called a "Telegraphic warrant of arrest" which is dated September 29, 1913 and addressed to "Immigration Service Honolulu," and requests the arrest of "TOKU TAKI," among other aliens alleged to have been found practicing prostitution after entry. (See pp. 30-31 Trans.) *This cablegram is not a warrant of arrest.* It does not bear the ear marks of a warrant. It is defective in the following particulars essential to a warrant:

1. It is not directed to or addressed to any "person or persons therein described" within subd. 4 (a) Rule 22 Immigration Rules. It is simply addressed to "Immigration Service Honolulu."

It should have been addressed to a definitely named person, an official in the Immigration Service before whom Appellant could have been brought for hearing to be a valid warrant and to comply with the requirements of Rule 22 subd. 4 (a), which provides "upon receipt of a warrant of arrest the alien shall be taken before the person or persons therein

described and granted a hearing to enable him to show cause," etc. Subd. 2 of Rule 22 provides for telegraphic application for a warrant of arrest but not for a telegraphic warrant of arrest. Nowhere in the law or rules is there provision made for a telegraphic warrant of arrest. If such a warrant is proper it should, to be valid, contain the essentials of a warrant as shown by the warrant on pp. 26-27 Trans.

"It must be directed to the proper officer, either by name, or by a description of the office which he holds." Voorhees on the Law of Arrest, Sec. 45, p. 42, and cases cited.

(2) It does not state that the necessary complaint or application supported by evidence has been made as required by subd. 2 of rule 22 of Immigration Rules.

It does not appear from this cablegram that it is issued on any evidence or oath or affidavits or anything subd. 2 of Rule 22 provides:—

*"The application must state facts bringing the alien within one or more of the classes subject to deportation after entry. The proof of these facts should be the best that can be obtained * * * telegraphic application may be resorted to only in case of necessity and must state (1) that the usual written application has been forwarded by mail and (2) the substance of the facts and proof therein contained."*

From the record and the cablegram of September 29, 1913, it does not even appear that any application had been made or that any facts sufficient to

issue a warrant upon were in the possession of the Immigration Authorities either at Honolulu or at Washington. In fact, the only inference from the record is that no facts about Appellant were obtained by the Immigration Authorities until the alleged hearing on October 2, 1913.

See *Jouras v. Allen*, 222 Fed. 756.

(3) It states only conclusions and not facts which are sufficient to bring Appellant within the excluded classes, and from an inspection of said cablegram Appellant could not know the charge against her so as to prepare her defence.

To be a valid warrant the cablegram of September 29, 1913, should state facts sufficient to charge a violation of the Immigration act, and not only the base legal conclusion "Alien found practicing prostitution after entry." This conclusion is stated in code, and from an inspection of it by an ordinary person, would convey no intelligence at all. Note Rule 22 Immigration Rules, Subd. 4 (b), which provides for an inspection of the warrant and evidence on which it is based by the alien after arrest during the course of the hearing. See *Voorhees on the Law of Arrest*, Sec. 45, p. 41. *U. S. v. Libray*, 178 Fed. 144, 185 Fed. 401, 107 C. C. A. 483.

The alleged warrant (cablegram) does not even specify the section of the Act of Congress or the Act of Congress with the violation of which the alien is charged. Under this alleged process upon inspection thereof, an alien could not prepare a defense.

(4) It is not a warrant for Appellant, since it does not name Appellant nor sufficiently describe her. The cablegram of September 29, 1913, does not name Appellant, whose name is "TOKU SAKAI," but calls for the arrest of "TOKU TAKI," nor does it describe Appellant, so that she could be identified. This is essential to its validity as a warrant.

Ex. p. Pouliot, 196 Fed. 437.

U. S. v. Amor, 68 Fed. 885, 16 C. C. A. 60.

"It must correctly name the defendant, or so accurately describe him that from the description he may be identified."

Voorhees on the Law of Arrest, Sec. 45, p. 42, and cases.

"A warrant will not justify the arrest of one not named therein, by reason of the fact that the name used was supposed to be his." Voorhees on the Law of Arrest, Sec. 90, p. 83, citing *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752, 28 L. ed. 643.

(b) There was no arrest of Appellant TOKU SAKAI, since she was not named in the cablegram of September 29, 1913, and it does not appear from the record that Appellant was arrested under this cablegram, there being no return. This follows from the above, and Appellant's detention on October 2 and 7, 1913, was therefore false imprisonment.

(c) Appellant was not brought before the Administrative Officer named in the cablegram, since no person is named in the cablegram, but only "Immigration Service Honolulu." Appellant was brought

before Harry B. Brown, on October 2 and 7 (see pp. 29-30 Trans.), and he is not named in the cablegram. (See pp. 30-31 Trans.) This is contrary to Rule 22 of Immigration Rules, Subd. 4 (a).

(d) No evidence was offered before any officer named in the cablegram since no person was named therein. This follows from the above since the evidence was taken before Harry B. Brown.

(e) Harry B. Brown, the person who heard the evidence at the alleged hearings of October 2, 1913, and October 7, 1913, never made any decision or finding to the effect that Appellant appeared to be from the evidence within the excluded classes and subject to deportation. The only thing in the record which even approaches a decision or finding is to be found on pp. 24-25 of Trans., entitled, "Remarks by examining Inspector." Who made these remarks does not appear. It is elementary that to constitute due process in an administrative hearing of the sort contemplated in deportation proceedings, the person, Inspector or whatever he may be who heard the evidence must make his finding or decision therefrom. Someone else cannot do it for him. For aught that appears from the record, any one of the Immigration Inspectors at the Port of Honolulu, may have made the remarks on March 16, 1914, contained on pp. 24-25 Trans. See *U. S. v. Williams*, 185 Fed. 589, 599; *U. S. v. Wong Chung*, 92 Fed. 141, 144; *In re Kornmehl*, 87 Fed. 314, 315; *Ex p. O w Guen*, 148 Fed. 926; *In re Di Simone*, 108 Fed. 942; *U. S. v. Gin Fung*, 100 Fed. 389, 40 C. C. A. 439.

Thus we contend that it has been established that up to October 17, 1913, there was no hearing at all in the case of Appellant TOKU SAKAI. On October 17, 1913, a cablegram was received similar to the cablegram of September 29, 1913. (See p. 28 Trans.) Except for the fact that it correctly names Appellant, the same objections may be urged against it as are above urged against the cablegram of September 29, 1913, and it cannot be said to be a warrant of arrest at all. From the record it does not appear that Appellant was ever arrested under it. On pp. 26-27 of Trans. we have the warrant of arrest for Appellant. It is dated October 17, 1913, but the record does not show when it arrived at Honolulu or that Appellant was ever arrested under it or given a hearing under it. The record shows a letter to Attorney Sheldon dated December 18, 1913 (see p. 26 Trans.), and on December 22, 1913, Attorney Sheldon appears, but before whom? The record does not show, nor does it show that Appellant was brought before anyone after October 7, 1913. (See p. 25 Trans.) No evidence was introduced and nothing was done in the way of a hearing after October 7, 1913. On March 12, 1914 (see p. 25 Trans.), we have the practical withdrawal of Attorney Sheldon from the case. The evidence taken on October 2 and 7, 1913, was never introduced before Harry B. Brown, at any time after it was taken either before or after the warrant of arrest dated October 17, 1913. Surely the mere opportunity given Attorney Sheldon

to introduce evidence or file a brief does not constitute a hearing. On p. 24 Trans., we have Mr. Halsey's letter stating that Appellant was given a hearing as directed in warrant of arrest No. 53678/465, which is the warrant on p. 26 Trans., dated October 17, 1913. This is a mistake as we have shown, because the only hearings were had on October 2 and 7, 1913, based on the cablegram of September 29, 1913, the alleged "Telegraphic warrant of Arrest attached as Exhibit A." Thus it is submitted that Appellant had no hearing at all so far as the record discloses, i. e., the record fails to disclose that Appellant had due process of law.

We pass now to the second proposition.

2. Appellant was given only the semblance of a hearing before the Immigration Authorities at Honolulu and thus denied due process of law.

Admitting for the purpose of argument that Appellant had a hearing, it is contended that this hearing did not amount to due process of law, and was only the semblance of a hearing because—

A. Appellant was not advised of her right to be represented by counsel as required by the Constitution of the United States, the law and the Immigration Rules.

B. Appellant was not allowed to inspect the warrant of arrest or the evidence on which it was based during the course of her hearing.

C. Appellant was not informed of her rights nor

of the charge against her, and was compelled to be a witness against herself.

D. All of the evidence against Appellant was obtained from herself in violation of her legal and constitutional rights, and therefore could not be used against her to base a finding or decision against her on, or an order of deportation on.

E. There is not sufficient evidence against Appellant to base a decision or finding against her on, or an order of deportation against her on.

F. That the alleged finding and order or warrant of deportation against Appellant is not supported by any evidence or sufficient evidence.

We will consider the contentions in order.

A. All of the grounds submitted under 1 supra why there was no hearing at all may be here urged to sustain the proposition that there was only the semblance of a hearing in this case. Subd. 4 (b) of Rule 22 of Immigration Rules provides for counsel for the alien. It attempts to vest a discretion in the officer conducting the hearing and provides:—"and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel, or waives the same, and his reply shall be entered on the record." It is submitted that the right to counsel is an absolute one and no discretion such as is attempted to be vested by this rule can be constitutionally vested in the ad-

ministrative officer. The discretion was abused in this case, as shown on the record. Appellant was not advised as to her right to counsel on October 2, 1913, at any time during that alleged hearing. It was not until October 7, 1913, five days later, when she was again brought before Harry B. Brown, that she was asked, "Do you want a lawyer?" and she answered "Yes." (See pp. 29-30 Trans.) After her hearing was all over for five days, then she was asked about her constitutional right, and her right under the rule to counsel, after she had been sworn and practically compelled to be a witness against herself, and give answers tending to show her guilty of an offense against the laws of the United States relative to adultery and fornication in force in the Territory of Hawaii. She should have been advised at the outset of or at least at some time during the hearing on October 2, 1913, of her right to counsel.

"A denial of permission to him to see the warrant and to have counsel until within five minutes of the close of the hearing, would be a clear abuse of discretion, and would render the provisions of the rule as administered 'inconsistent with law' and void. Although a law or rule be fair and just in appearance, yet, if it is applied and administered by public authority with an evil eye and an oppressive hand, so as to deprive a person of his fundamental rights, it cannot be sustained."

Whitfield v. Hanges, 222 Fed. 745, 751, and cases cited. "One of the objects of this rule was to give not to deprive, the alien of the benefit of counsel. The time when an alien, who is ordinarily ignorant of

the law, of legal procedure and of his rights, may derive the most benefit of counsel is when he is arrested and his hearing begins. It would have been no abuse of discretion of the inspector to have permitted the Appellees to have counsel to advise them immediately upon their arrest, and to have permitted them and their counsel to inspect the warrant of arrest, to be present and take part in the proceedings at and after the first stage of the examination and hearing of the aliens. Such a course would have been in accord with the fundamental principles of English and American jurisprudence consistent with law, and it should have been pursued."

Whitfield v. Hanges, 222 Fed. 745, 751.

See also

Low Wah Suey v. Backus, 225 N. S. 460, 325 Ct. 734, 56 L. ed. 1165.

Roux v. Comm., etc., 203 Fed. 413, 121 C. C. A. 523.

U. S. v. Wong, 94 Fed. 832.

B & C. Nowhere in the record does it appear that Appellant nor Attorney Sheldon was allowed to inspect any warrant of arrest or any evidence or informed of the charge against Appellant. The cables are in code and an inspection would do no good without an explanation by someone who knew the code. On October 2, 1913, Appellant was sworn and required to answer questions with no explanation of what she was to face or the charge against her, if any, or the evidence against her. (See pp. 29-30

Trans.) These things should have been done, and their omission constitutes an abuse of discretion and shows the hearing to have been unfair and only the semblance of a hearing. See Rule 22, Subd. 4 (b), of Immigration Rules requiring these things to be done.

Also

Whitfield v. Hanges, 222 Fed. 745, 751.

Ex. p. Petloos, 212 Fed. 275, 214 Fed. 978.

U. S. v. Wong, 94 Fed. 832.

Jouras v. Allen, 222 Fed. 756.

An ignorant alien, a Japanese woman, should have been given opportunity to seek independent advice or the advice of counsel. To be brought up before an official, a stenographer and an interpreter, sworn, and asked questions amounts to compulsion, or at least to unfairness, especially when the subject is an ignorant alien, and this is done with no explanation. Appellant was not even told that she need not incriminate herself, or that her answers could be used to deport her from the country. This procedure could have but one effect upon her untrained mind, i. e., to produce the belief that she must answer the questions, and she did.

See *Jouras v. Allen*, 222 Fed. 756.

Whitfield v. Hanges, 222 Fed. 745.

D. The only evidence against Appellant as shown by this record was obtained on October 2 and 7, 1913, at the two alleged hearings on those dates. (See pp. 29-30 Trans.) This evidence consists entirely of Ap-

pellant's own answers to questions put to her. Such evidence obtained from Appellant in violation of her rights could not be used against her at any subsequent hearing or to base a decision, finding or order against her upon as was attempted. (See pp. 24-25 Trans.)

See *U. S. v. Wong Quong Wong*, 94 Fed. 832.
35 Cyc. 1263.

Appellant had been for over eleven years a resident of the United States, in the Territory of Hawaii, and to be taken into custody before Harry B. Brown, upon the cablegram of September 29, 1913, and questioned was clearly in violation of Appellant's rights, under the Constitution of the United States against unreasonable searches and seizures, and not to be deprived of her liberty without due process of law. (See pp. 5-15-44-30-31 Trans.) The cablegram of September 29, 1913, was not a warrant and the alleged hearings of October 2 and 7, 1913 (pp. 29-30 Trans), when Appellant was questioned and gave all of the evidence against herself, therefore constituted a false imprisonment of Appellant and all of this was unnecessary so far as the record speaks. No results so obtained should be allowed to be used against Appellant in any way.

Whitfield v. Hanges, 222 Fed. 745.

Jouras v. Allen, 222 Fed. 756.

35 Cyc. 1263.

U. S. v. Wong Quong Wong, 94 Fed. 832.

E. & F. The evidence in toto contained on pp.

29-30 Trans. is not sufficient to warrant a deportation of Appellant upon as a matter of law. Appellant alleges in her petition for a writ of habeas corpus that she has been for over eleven years a resident of the Territory of Hawaii, and this is not denied by the returns to the writ of habeas corpus. (See pp. 5 and 15 Trans.) Appellant testifies to this effect at p. 29 Trans. where she says she came to Hawaii "Mejii 37," which means about eleven years before October 2, 1913. This is recognized by the learned lower court's decision. (See p. 44 Trans.) Appellant is a married woman and separated from her husband (p. 29 Trans). The evidence is that about five years ago Appellant practiced prostitution for the period of about one year. (See pp. 29-30 Trans.) This mere temporary practice of prostitution while separated from her husband done and over with by her four or five years before the deportation proceedings on October 2, 1913, were commenced against her do not justify her deportation, as a matter of law.

Sprung v. Morton, 182 Fed. 330.

The alleged finding or decision contained on pp. 24-25 Trans. reads: "From the testimony of this woman it appears that she is an alien, and that she has been practicing prostitution for a livelihood." Even admitting that there is evidence of her practicing prostitution for the purposes of argument, yet, there is absolutely no evidence on the record that she did so for a livelihood or for any other purpose or

end or aim. She may have done it for pleasure, or because she was compelled to by others, or for almost any reason. This finding shows the bias and prejudice of the authorities in this case.

The evidence is not sufficient to bring Appellant within the class excluded by the act, i. e., aliens found practicing prostitution after entry. Note the evidence.

Q. Have you been practicing prostitution?

A. Yes.

Q. How long?

A. About one year, and I did before that time.

Q. When did you first start in the occupation?

A. About five years ago.

(See pp. 29-30 Trans.) There is no evidence that within four or five years of the date the above evidence was taken, which was October 2, 1913, Appellant had practiced prostitution. Appellant had been a resident of the Territory of Hawaii, at that time, for about eleven years. The evidence does not show she was found or ascertained to be practicing prostitution within three years after her entry or on or about October 2, 1913. Secs. 20 and 21 of "The Immigration Act" provide for deportation of aliens "within the period of three years after landing or entry into the United States." Surely Appellant is not within the intent and meaning of the provisions of this act, and subject to deportation. She entered not three but about eleven years before October 2, 1913, and she had not practiced prostitution for four

or five years prior to the time of her attempted deportation. Thus as a matter of law, from the undisputed evidence she does not come within the spirit and letter of the law, and cannot be deported.

Again, it is submitted that there is no evidence to show that she comes within the act. As a matter of law her answer "Yes" to the question "Have you been practicing prostitution?" is not sufficient to put Appellant in the class subject to deportation. It merely called for and obtained a conclusion from Appellant and might have meant many things. It should have been shown *When, where, and under what circumstances* Appellant practiced prostitution, that Appellant had sexual intercourse with men, and took money and thereby earned her living. With such evidence only could Appellant be deported.

See

U. S. v. Williams, 200 Fed. 538, 118 C. C. A. 632.

U. S. v. Williams, 189 Fed. 915, 206 Fed. 915, 206 Fed. 460, 124 C. C. A. 366.

U. S. v. Williams, 175 Fed. 274.

Ang Eng Chong v. Collector of Customs, 23 Philippine 614.

U. S. v. Whl., 211 Fed. 628.

U. S. v. International Mercantile Mar. Co., 194 Fed. 408, 114 C. C. A. 370.

U. S. v. Williams, 190 Fed. 897.

Ex. p. Watchorn, 160 Fed. 1014.

U. S. v. Gin F. Ung, 100 Fed. 389, 40 C. C. A. 439.

In conclusion it is now respectfully submitted that Appellant was denied due process of law (1) in that she was given no hearing, (2) and if given a hearing it was not a legal hearing, but only the semblance of a hearing. Appellant should therefore be discharged under her writ of habeas corpus.

Respectfully submitted,

GEORGE A. DAVIS,

WILLIAM T. RAWLINS,

CHARLES ~~A.~~^{S.} DAVIS,

Attorneys for TOKU SAKAI, Appellant.

Dated at Honolulu this

20th day of July, A. D. 1916.

No. 2794

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOKU SAKI,

Appellant,

VS.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Upon Appeal From the United States District Court
For the Territory of Hawaii.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellee.

Filed this.....day of October, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 2794

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

TOKU SAKI,

Appellant,

VS.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Appellant relies upon two propositions in support of her appeal, as follows:

1. That "she was given no hearing at all before the Immigration authorities at the port of Honolulu, under the Constitution and Laws of the United States and the Immigration Rules," and

2. That "she was given only the semblance of a hearing before the Immigration authorities at the port of Honolulu, under the said laws and rules."

Both appellant and appellee agree that the deportation proceedings were instituted and prose-

cuted under that portion of Section 3 of the Immigration Laws, which reads as follows:

“Any alien who shall be found * * * practicing prostitution after such alien shall have entered the United States * * * shall be deemed to be unlawfully within the United States and should be deported in the manner prescribed by Sections 20 and 21 of this Act.”

It is also agreed that the deportation proceedings under said Section 3 are governed by Sections 20 and 21 of said Immigration Laws and Rule 22 thereof.

The principal point of contention in the appeal is whether or not the said alien was given a fair hearing, and while the transcript does not contain all of the proceedings that took place before the Immigration officials, yet the Government is of the opinion that enough of the Immigration record is set forth in the transcript to support the order of deportation of the Secretary of Labor and a brief review of the steps taken will support this view.

On September 29, 1913, a cablegram was sent in code form by the Acting Secretary to the “Immigration Service, Honolulu” (pp. 30 and 31 Trans.) authorizing the arrest of said alien Toku Saki, that said cablegram, when translated, reads as follows:

“ARROW: Arrest following named alien(s) and bring before yourself for hearing, forwarding record of proceedings to the Department.

PROGNOSIS: Alien found practicing prostitution after entry.

RELAY: Authority granted for release from custody under bond in the sum of _____ hundred dollars."

That following the receipt of said warrant of arrest, the said alien was given a hearing (pp. 29 and 30 Trans.). The only account of the hearing given in said transcript is set forth as follows:

"United States Immigration Service,
Honolulu, T. H., October 2, 1913.

Examining Inspector—Harry B. Brown.

Interpreter—Chomei Tajima.

Stenographer—Charles W. Durkee, Jr.

Case of Toku Sakai—Prostitute.

Telegraphic warrant of arrest attached as
"Exhibit A."

Alien sworn, testified:

Q. What is your name? A. Toku Sakai.

Q. How old are you? A. Twenty-eight.

Q. Born where?

A. Hiroshima City, Hiroshima Ken.

Q. When did you first come to Hawaii?

A. Meiji 37.

Q. What boat?

A. I forgot the name of the boat.

Q. What is the name of your husband?

A. Segawa Gonjiro.

Q. Where is he now?

A. It is seven years since I separate from him, may be in the United States or may be in Hawaii.

Q. Have you been practicing prostitution?

A. Yes.

Q. How long?

A. About one year and I did before that time.

Q. Well, when did you first start in the occupation?

A. About five years ago.

(Alien signed her name in the note book.)

October 7, 1913.

Interpreter—Tomizo Katsunuma.

Q. What is your name?

A. Toku Sakaye (Sakai).

Q. Do you want a lawyer? A. Yes.

Certified correct.

(Sgd.) Charles W. Durkee, Jr.

Stenographer."

The transcript shows that the said hearing was conducted on October 2 and October 7, 1913, and that the examination was carried on through an interpreter, and during the course of the said examination the alien was asked if she wanted an attorney to which she replied in the affirmative.

On October 17, 1913, another cablegram was sent by Acting Secretary Post to the Immigration Office at Honolulu, authorizing the arrest of said alien (p. 28 Trans.) and on the same date a written warrant was also forwarded (pp. 26 and 27 Trans.), the contents of which are as follows:

“Warrant—Arrest of Alien.

Form 561.

United States of America,
Department of Commerce and Labor,
Washington.

No. 53, 678/459-460-1-2-3-4-5.

To Richard L. Halsey, Inspector in Charge,
Honolulu, T. H.

Whereas, from evidence submitted to me, it appears that the aliens Ching Lum, Sui Joy, Chun Pin, Wong Yuen, Kwanjiro Haruta, Hatsume Haruta, and TOKU SAKAI, who landed at some unknown port, on the — day of —, have been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, for the following among other reasons:

That the said Ching Lum, Sui Joy, Chun Pin, Wong Yuen, and Kwanjiro Haruta are unlawfully within the United States in that they have been found receiving, sharing in, or deriving benefit from the earnings of a prostitute, or prostitutes; and that the said Hatsume Haruta and TOKU SAKAI are prostitutes and have been found practicing prostitution subsequent to their entry into the United States.

I, Louis F. Post, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said aliens and grant them a hearing to enable them to show cause why they should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized payable from the appropriation “Expenses of Regulating Immigration, 1914.” Pending further proceedings, the aliens

may be released from custody upon furnishing satisfactory bond in the sum of \$1000 each.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 17th day of October, 1913.

(Sgd.) Louis F. Post,
Acting Secretary of Commerce
and Labor."

Toku Saki was represented by an attorney and this fact appears on page 26 of the transcript, where he was addressed as follows:

"Department of Commerce and Labor,
Immigration Service.
Office of Inspector in Charge,
Honolulu, Hawaii, December 18, 1913.

Mr. Wm. J. Sheldon,
Merchant Street,
Honolulu, T. H.

As attorney in the case of Toku Sakai, you are hereby notified that a further hearing in this case will be had on Monday, December 22d, at 9:30 a. m., at which time any evidence pertinent to the case that you submit will be considered.

Immigrant Inspector."

On page 25 of the transcript in this case it clearly appears that the said alien's attorney was looking after her interests and finally concludes that it was unnecessary to offer any further evidence of testimony, and expressly waived the filing of a brief (pp. 25 and 26 Trans.).

On March 16, 1914, the Immigration Inspector in Charge at Honolulu transmitted the testimony to the Secretary of Labor by letter (p. 24 Trans.), which reads as follows:

No. 4280/90. March 16th, 1914.
The Honorable,
The Secretary of Labor,
Washington, D. C.
(Thru Commissioner-General of
Immigration.)

There is transmitted herewith the testimony in the case of Toku Sakai, who was arrested and given a hearing as directed in Warrant of Arrest No. 53678/465.

(Signed) Richard L. Halsey,
Inspector in Charge.

HBB/JLM.
In re:
Toku Sakai,
No. 4280/90.”

When the Secretary of Labor received the evidence presented in the hearings of said Toku Saki, the said Secretary of Labor forwarded to Richard L. Halsey, Immigration Inspector, a warrant of deportation (pp. 22 and 23 Trans.), which reads as follows:

“WARRANT—DEPORTATION OF ALIEN.
UNITED STATES OF AMERICA,
DEPARTMENT OF COMMERCE AND LABOR,
Washington.

No. 53678/465.
To RICHARD L. HALSEY, Inspector in
Charge, Honolulu, T. H.

Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector Harry

B. Brown, held at Honolulu, T. H., I have become satisfied that the alien TOKU SAKAI, who landed at the port of Honolulu, T. H., has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That the said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States, and may be deported in accordance therewith.

I, J. B. Densmore, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to Japan, the country whence she came, at the expense of the appropriation 'Expenses of Regulating Immigration, 1914.' You are directed to purchase transportation for the alien from Honolulu, T. H., to her home in Japan at the lowest scheduled rate obtainable from the Pacific Mail Steamship Company, payable from the above mentioned appropriation.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 28th day of March, 1914.

(Signed) J. B. DENSMORE,

Acting Secretary of Commerce and Labor.
CEB.

11-2721."

The Government agrees with appellant's counsel in his statement set forth in the opening brief that in order to have a hearing there must be

- a. A valid warrant of arrest,
- b. Arrest of the alien under that warrant,

c. The bringing of that alien before the administrative officer named in the warrant,

d. Evidence produced and offered before that administrative officer,

e. A finding or decision by such administrative officer actually made and based upon that evidence,

and in this connection the Government contends that each and every of the above steps were taken, and counsel's position that a "telegraphic warrant of arrest," directed to "Immigration Service, Honolulu," is not sufficient, is not well taken. All that the Immigration Laws require in this case is that the Secretary of Labor "cause such alien to be taken into custody * * * ". If an arrest cannot be made by a telegraphic warrant, in many cases the alien cannot be apprehended and justice would be totally defeated. Section 21 of the Immigration Act does not specify in what manner the warrant of arrest must issue, and inasmuch as the laws of our land permit arrest to be made by telegraphic warrant, there certainly can be no objection to an arrest being made by an Immigration officer in pursuance to the carrying into effect of the Immigration Laws.

Since the alien is charged in this case with *practicing prostitution after entry*, the three-year period in which most aliens must be deported does not apply.

Zakonaite vs. Wolf, 228 U. S. 272;

Bugajewitz vs. Adams, 228 U. S. 584.

Appellant also takes the position that the warrant was defective because it was directed to the "Immigration Service, Honolulu," but the Government submits that this designation is sufficiently specific and that the warrant, itself, contains all of the necessary information that the law requires, since it sufficiently designates the person to be arrested and sets forth the charge placed against the said alien. (pp. 30 and 31 Trans.)

Appellant also takes the position that the said alien was not properly informed of her rights. While the record, as it appears in the transcript, is incomplete, the praecipe indicates that a complete record was not called for by appellant, and since there is no showing that the said alien was not given a fair trial, it is presumed that all of the steps taken by the Immigration officials were regular.

Gonzales vs. Ross, 120 U. S. 605.

The record shows that the alien was represented by an attorney, and if there was any irregularity in the proceedings, or any unfairness on the part of the Immigration officials, that fact should have been taken advantage of by the alien's counsel and the record should have shown wherein the unfairness existed.

As the record now appears in the transcript, no complaint was ever made on the part of the alien and there was never any intimation by her or her counsel that she was not being treated fairly during the course of her hearings. In fact, her counsel ex-

pressly waived any further opportunity of presenting further *evidence* or a *brief* in the case.

It is also contended that the evidence was insufficient to support the warrant of deportation. In reply to this contention, attention is again called to the alien's testimony which appears on page 29 of the transcript, wherein she admitted that she had practiced prostitution. Because of this frank admission on the part of the said alien, and for the further reason that the record, as presented in the transcript, does not show that any advantage was taken by the Immigration officials over said alien, it is the Government's contention that the Immigration officials did not abuse their discretion and acted within the latitude usually accorded them in such cases.

White vs. Gregory, 213 Fed. 768;

Healy vs. Backus, 221 Fed. 358;

Lee Lung vs. Patterson, 186 U. S. 170.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellee.

No. 2798

United States
Circuit Court of Appeals
For the Ninth Circuit.

T. F. TURNER,

Appellant,

VS.

KATE J. WELLS, IRONSIDES MINING RE-
DUCTION AND LEASING COMPANY, a
Corporation, MRS. E. R. SHOCKMAN,
GEORGE E. ARNOLD and C. J. HECK-
MAN,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Southern District of California,
Northern Division.

Filed

SEP 23 1916

F. D. Monckton,

Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

T. F. TURNER,

Appellant,

vs.

KATE J. WELLS, IRONSIDES MINING REDUCTION AND LEASING COMPANY, a Corporation, MRS. E. R. SHOCKMAN, GEORGE E. ARNOLD and C. J. HECKMAN,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Southern District of California,
Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer to Second Amended Bill of Complaint..	17
Assignments of Error	81
Attorneys, Names and Addresses of.....	1
Bond on Appeal	86
Citation	1
Condensed Statement of Witness' Testimony in Narrative Form	42
EXHIBITS:	
Defendant's Exhibit 1.....	37
Plaintiff's Exhibit "L"—Letter of 2/11/12, Wells to T. F. Turner and J. F. Creel..	47
Final Decree	35
Minute Order of Court of Date, February 23, 1915	31
Minute Order of Court of Date March 10, 1913.	30
Names and Addresses of Attorneys.....	1
Opinion and Order Denying Rehearing.....	77
Order Allowing Appeal	84
Order Extending Time to March 31st, 1916....	92
Order Extending Time to May 31st, 1916.....	93
Order to Dismiss One Defendant, Mrs. E. B. Shookman	30
Petition for Allowance of Appeal.....	79

Index.	Page
Praecipe for Preparation of Transcript.....	89
Second Amended Bill of Complaint.....	3
TESTIMONY ON BEHALF OF PLAINTIFF:	
CREEL, J. F.....	59
Cross-examination	61
Redirect Examination	61
GODFREY, BENJAMIN T.....	55
Cross-examination	56
MILES, Mrs. DELLA	56
REDFIELD, W. D.....	58
TURNER, T. F.....	43
TESTIMONY ON BEHALF OF DEFEND- ANTS:	
WELLS, KATE J.....	63
Cross-examination	71
Redirect Examination	75
Recross-examination	75

Names and Addresses of Attorneys.

For Appellant:

Messrs. WM. B. OGDEN and RALPH E.
ESTEB, 711 American Bank Building, Los
Angeles, California.

For Appellees:

Messrs. S. E. VERMILYEA and S. L. CAR-
PENTER, 1100-1102 Hibernian Building,
Los Angeles, California. [3*]

*In the District Court of the United States of Amer-
ica, for the Southern District of California,
Southern Division, Ninth Circuit.*

No. 45-CIVIL. IN EQUITY.

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS et al.,

Defendants.

Citation.

United States of America,—ss.

To Kate J. Wells, Ironsides Mining Reduction and
Leasing Company, a Corporation, Mrs. E. R.
Shockman, George E. Arnold and C. J. Heck-
man, Greetings:

You are hereby cited and admonished to be and
appear at a United States Circuit Court of Appeals
for the Ninth Circuit to be held at the City of San
Francisco, in the State of California, on the 20th

*Page-number appearing at foot of page of original certified Record.

day of Jany., 1916, pursuant to an order allowing an appeal entered in the clerk's office of the District Court, in and for the Southern District of California, Southern Division, in that certain suit in equity numbered 45—Civil in Equity, wherein you are defendants and appellees and T. F. Turner is complainant and appellant, to show cause, if any there be, why an order or decree of said Court made and entered March 6th, 1915, against said appellant in the said order allowing appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable BENJAMIN F. BLEDSOE, United States District Judge of the Southern District of California of the Ninth Judicial Circuit, this 22d day of December, 1915.

BENJAMIN F. BLEDSOE,
U. S. District Judge for Southern District of California. [4]

Due service and receipt of a copy of the within Citation is hereby admitted this 23 day of December, 1915.

S. E. VERMILYEA,

S. L. CARPENTER,

Solicitor for Defendants. [5]

[Endorsed]: No. 45—Civil. In Eq. In District Court of U. S., Southern District of Cal., Southern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells, et al., Defendants. Citation. Filed Dec. 23, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [5a]

*In the District Court of the United States, in and
for the Southern District of California, North-
ern Division.*

No. 45-CIVIL. IN EQUITY.

T. F. TURNER,

Complainant,

vs.

KATE J. WELLS, IRONSIDES MINING RE-
DUCTION AND LEASING COMPANY, a
Corporation, MRS. E. R. SHOOKMAN,
GEORGE L. ARNOLD and C. J. HECK-
MAN,

Defendants. [6]

*In the District Court of the United States, for the
Southern District of California, Northern
Division.*

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS, IRONSIDES MINING RE-
DUCTION AND LEASING COMPANY, a
Corporation, MRS. E. R. SHOOKMAN,
GEORGE L. ARNOLD and C. J. HECK-
MAN,

Defendants.

Second Amended Bill of Complaint.

T. F. Turner, a citizen of the United States and
of the State of Massachusetts, plaintiff herein, by

P. F. Carney and Wm. B. Ogden, his solicitors, by leave of Court files this, his second amended Bill of Complaint, and complains of Kate J. Wells, Ironsides Mining Reduction and Leasing Company, a corporation, Mrs. E. R. Shockman, George L. Arnold and C. J. Heckman, each a citizen and inhabitant of the State of California, and alleges:

I.

That the plaintiff herein is a citizen and resident of the State of Massachusetts.

II.

That the defendants Mrs. E. R. Shockman, George L. Arnold and C. J. Heckman, are citizens and residents of the State of California.

III.

That the defendant Ironsides Mining Reduction and Leasing Company is a corporation organized and existing under and by [7] virtue of the laws of the State of California.

IV.

That this suit is between citizens of different states. That the amount in controversy herein exceeds the sum of \$3,000, exclusive of interest and costs.

V.

That on or about the 10th day of March, 1907, at Rhyolite, Nye County, State of Nevada, plaintiff J. F. Creel and A. W. Wells made and entered into a contract and agreement in and by which it was mutually contracted and agreed that the said plaintiff and J. F. Creel were to furnish a prospecting outfit, to wit: Team, wagon, mining outfit, tools, sup-

plies and provisions, and as needed from time to time to advance moneys for said undertaking, and the said A. W. Wells was to furnish his time and labor in prospecting for lodes and deposits upon the public mineral domain in the State of California, and to locate all discoveries and to record the same in the joint names of plaintiff J. F. Creel and himself, and in their names only as equal owners; that is, one-third each; that said contract and agreement was to continue until mutually dissolved.

VI.

That in furtherance and pursuance of said contract and agreement and on or about the date aforesaid, plaintiff and the said J. F. Creel did furnish to the said A. W. Wells a prospecting outfit consisting of a team of mules, wagon, mining outfit, tools, supplies, provisions and money from time to time as needed and in all respects kept and performed the said agreement upon their part. That the said Wells took possession of the said prospecting outfit and proceeded to Inyo County, State of California, on a prospecting trip, and that while said contract and agreement was in force and effect the said Wells made discoveries [8] and locations in the name of plaintiff Creel and himself of the Summit, Callahan, Don Creel, Extension and T. F. T. lode mining claims in what is now known as the Beveredge Mining District, Inyo County, California; that later, and while said contract and agreement was still in force and effect, and by reason and in pursuance thereof, the said Wells discovered and located the following lode mining claims in what is now known as the

Beveredge Mining District, Inyo County, California; Ironsides claim, located June 22, 1907, recorded in book C, page 509, records Inyo County, California, said location having been made in the name of Mrs. A. W. Wells and B. T. Robinson; Iron Max claim, located June 28, 1907, recorded in book I, page 277, records Inyo County, California, said location having been made in the names of B. T. Robinson and Harold N. Robinson; Beveredge Belle claim, located August 17, 1907, recorded in book 1, page 547, records Inyo County, California, said location having been made in the names of Mrs. Kate J. Wells and B. T. Robinson; Catch-em-Mac claim, located June 22, 1907, recorded in book 1, page 276, records Inyo County, California, said location being made in the names of Mrs. A. W. Wells and B. T. Robinson; Garnet Fraction claim, located August 1, 1907, recorded in book 1, page 545, records of Inyo County, California, said location being made in the names of Mrs. A. W. Wells and B. T. Robinson; Golden Rule No. 1 claim, located July 29, 1907, recorded in book 6, page 587, records of Inyo County, California, said location having been made in the name of Mrs. A. W. Wells and B. T. Robinson; Kate J. claim, located July 29, 1907, recorded in book 1, page 546, records of Inyo County, California, said location having been made in the name of Kate J. Wells and B. T. Robinson; Golden Rule No. 2 claim, located June 7, 1907, recorded in book 2, page 510, records of Inyo County, California, said location having been made in the names of Mrs. A. W. Wells and B. T. Robinson; [9] Golden Rule No. 3 claim, located June 8, 1907,

recorded in book 1, page 274, records of Inyo County, California, said location being made in the names of Mrs. A. W. Wells and B. T. Robinson; Grand View claim, located July 15, 1907, recorded in book 1, page 545, records of Inyo County, California, said location having been made in the names of Mrs. A. W. Wells and B. T. Robinson; Protection No. 1 claim, located July 29, 1907, recorded in book 6, page 589, records of Inyo County, California, said location being made in the names of Mrs. A. W. Wells and B. T. Robinson.

VII.

That as plaintiff is informed and believes, and so alleges, that the said A. W. Wells made all of said discoveries and wrote all of the location notices placed upon said locations, and that he performed all the preliminary acts of location upon each and all of said locations in accordance with the local mining rules and regulations, the laws of the State of California and of the United States, and subsequently had such locations filed of record at Independence, Inyo County, California.

VIII.

That Kate J. Wells and Mrs. A. W. Wells *is* one and the same person and *was* at all times herein mentioned the wife of the said A. W. Wells; that Harold E. Robinson and B. T. Robinson are sons of Mrs. A. W. Wells and the stepsons of A. W. Wells; that the said Kate J. Wells, B. T. Robinson and Harold E. Robinson each and all well knew that the said A. W. Wells, at the time the said locations were made in their names, was working under a grubstake con-

tract and agreement with plaintiff and said Creel, and that said last-mentioned locations were all wrongfully and fraudulently made in their names in pursuance of a conspiracy entered into between the said A. W. Wells, Kate J. Wells, B. T. Robinson and Harold E. Robinson, and for the purpose [10] of defrauding the said Turner and Creel of their rights under said contract and agreement; that said plaintiff nor the said Creel ever had any knowledge whatever that said locations were made in fraud of their rights by the said A. W. Wells in violation of their contract and agreement until the forepart of February, 1912, at which time the said A. W. Wells disclosed to the said Creel upon meeting him, that all of the said locations were made by him while he acted under and in pursuance of said grubstake agreement; that prior to the month of February, 1912, the said plaintiff and said J. F. Creel and the said A. W. Wells were, and had been at all times, upon the most friendly basis, and the said plaintiff and the said J. F. Creel were not residents of the State of California, and were not residents of the Beveredge Mining District, and had no means of ascertaining the happenings of, operations in, or development of said district, except upon information received from said A. W. Wells, and that the said plaintiff and the said Creel did trust and rely upon the said A. W. Wells implicitly as a partner in all matters pertaining to the location of the property acquired under the grubstake agreement, and that their business dealings at all times were such that,

so far as they knew, he was worthy of the faith and trust imposed in him by them, and that they did rely implicitly upon his opinion and advice in all things touching said affairs, and that they did not suspect that he had fraudulently located the mining claims mentioned in paragraph VI hereof at any time prior to or on or about the month of February, 1912, and did not then have knowledge, or suspect, or would not now know that he had so fraudulently located the said claims, had it not been for the fact that the said A. W. Wells and Kate J. Wells had a disagreement in regard to the said property, and other matters, and that the said A. W. Wells, feeling [11] aggrieved, informed the said Creel of the facts in regard thereto, and that the said plaintiff thereupon took such necessary steps as he deemed wise and expedient for the purpose of corroborating the statement of the said A. W. Wells, and that immediately after the said evidence was gathered, so corroborating the statement of the said A. W. Wells, this suit was brought, and that the said plaintiff and the said Creel did not acquiesce in and delay the demands of his or their rights unnecessarily long, nor to the injury of said defendants; that the only occasion prior to the month of February, 1912, when the said Turner and Creel were present in the said Beveredge Mining District was for a limited period in the summer of 1907, and in going over the property located by the said A. W. Wells in the name of Wells, Turner and Creel, the said Turner asked the said Wells why he did not locate the property on top of

the hill, meaning the Ironside, Iron Mac, and other locations, and to such inquiry the said Wells made reply that those locations had been made and held by Mrs. A. W. Wells and said Robinson for a long period of time prior to the year 1907, and prior to the time of his coming into said Beveredge Mining District, as hereinbefore set forth, and that the said Turner and Creel having confidence in the statements made by said Wells, relied thereon, and continued to contribute to the said Wells, supplies and moneys, provided by the terms of the said grubstake agreement, for many months thereafter; that at the meeting of the said Creel with the said Wells in the month of February, 1912, the said Wells stated to the said Creel that he had been trying to locate him and the plaintiff herein for more than a year past, and had advertised in the newspapers for them, so he could inform them of the fraud that he had practiced upon them in the making of the locations made in the names of Mrs. A. W. Wells, H. Robinson and B. T. Robinson; that the locations known as Ironside, [12] Iron Mac and others described in paragraph VI hereof were never at any time discussed between the said A. W. Wells and the plaintiff and Creel or any of them, or between the plaintiff and said Creel and the defendants herein named, or any of them, except as herein alleged; that plaintiff and the said Creel have never been residents of the said Beveredge Mining District, or acquainted with its affairs, and have resided a great distance therefrom, and were never acquainted with any facts which would lead them to suspect the violation of the said

grubstake agreement by the said A. W. Wells, until about the month of February, 1912, as hereinabove set forth.

IX.

That the said Kate J. Wells now holds the legal title to each and all of said locations.

X.

That as plaintiff is informed and believes, and so alleges, that the Ironsides Mining Reduction and Leasing Company was organized on or about the 8th day of June, 1912, by the defendant Kate J. Wells; that said company has a capital of \$100,000, 100,000 shares of capital stock of the par value of \$1 per share; that of said 100,000 shares of stock the said Kate J. Wells is the owner of 60,000 shares; that 40,000 shares, as plaintiff is informed and believes, was placed in the treasury of said company; that the said Kate J. Wells is in the absolute control of said company; that Harold E. Robinson is a director of said company, and William M. Johnson is an officer and director of said company, each with less than 100 shares of the stock of said company; that as plaintiff is informed and believes and so alleges, the defendant, Kate J. Wells, leased to the Ironsides Mining Reduction and Leasing Company the Ironsides, Iron Mac and Beveredge Belle lode mining claims for a period of five years, without royalty.

[13]

XI.

That as plaintiff is informed and believes, and so alleges, that the defendant Mrs. E. R. Shockman

claims some interest in the Golden Rule No. 2 lode mining claim, the nature and extent of which is unknown to this plaintiff, but plaintiff avers that he is the equitable owner of an undivided two-thirds' interest in and to said Golden Rule No. 2 lode mining claim by virtue of his and his associate, J. F. Creel's contract and agreement with the said A. W. Wells in the location of such claim.

XII.

That as plaintiff is informed and believes, and so alleges, that the defendants George L. Arnold and C. J. Heckman claim a lien upon the Ironsides lode mining claim by virtue of a mortgage executed by the said Kate J. Wells to said defendants to secure the payment of a note for the sum of \$2,700; plaintiff avers that he is the equitable owner of an undivided two-thirds interest in and to said Ironsides mining claim by virtue of his and his associate, J. F. Creel's agreement and contract with the said A. W. Wells in the location of said claim.

XIII.

That as plaintiff is informed and believes, and so alleges, that the defendant, Kate J. Wells, has worked, mined, extracted, sold and marketed large quantities of valuable ore and mineral from the said lode mining claims to the value of \$100,000, and is working and will continue to work, mine, extract, sell and dispose of the ore and minerals from said mining claim unless restrained by the equitable power of this Honorable Court, all to the great and irreparable damage of this plaintiff.

XIV.

That as plaintiff is informed and believes, and so alleges [14] that the Ironsides Mining Reduction and Leasing Company, as the lessee of the Ironsides, Iron Mac and Beveredge Belle lode mining claim, is working and will continue to work, said claims and to mine, extract, sell and dispose of the ores and minerals taken therefrom, to the great and irreparable damage of this plaintiff, unless restrained by the equitable powers of this Honorable Court.

XV.

That as plaintiff is informed and believes, and so alleges, that the Ironsides Mining Reduction and Leasing Company, by and through its officers and agents, and particularly through its president, Kate J. Wells, will sell and continue to offer for sale the stock of said company to innocent purchasers who, relying upon the false representations by its said officers and agents and the said Kate J. Wells as to the title of said property as herein set forth, will be defrauded out of their money unless restrained by the equitable powers of this Court.

XVI.

That as plaintiff is informed and believes, and so alleges, that the said Kate J. Wells has no property other than her alleged title in said mining location and is insolvent.

XVII.

That the said J. F. Creel on or about the 15th day of May, 1912, sold, assigned, transferred and set over unto the plaintiff herein, for a valuable consideration, all his right, title and interest of, in and to the

said contract and agreement between the said Turner, Wells and himself, and all rights thereunder.

WHEREFORE, in as much as plaintiff has no sufficient remedy at law for the wrong herein complained of, to the end that he may obtain the relief to which he is entitled in the premises, prays: [15]

1. That the plaintiff be decreed and adjudged to be the owner of an undivided two-thirds interest in the said property, and that the defendant, Kate J. Wells, be decreed to hold the same in trust for plaintiff, and that she be required to execute a proper deed of conveyance of the legal title of a two-thirds interest in the said property; that upon her failure so to do that the Court appoint a commissioner to make such conveyance.

2. That the defendants Ironsides Mining Reduction and Leasing Company, Mrs. E. R. Shockman, George L. Arnold and C. J. Heckman, be required to set forth their respective claims or demands to the said mining claims and premises, to the end that the same may be justly adjudicated and be declared null and void as against plaintiff's said interest.

3. That the defendant, Kate J. Wells, be required to account to this plaintiff for all the profits and proceeds of ores and minerals mined, extracted, sold and marketed from said property from the 7th day of June, 1907, to the present date.

4. That during the pendency of this action the defendant Kate J. Wells, be restrained and enjoined from selling, conveying or encumbering said property; that she be restrained and enjoined from working, mining, extracting, selling or disposing of the

ores or minerals of said property ; that the Ironsides Mining Reduction and Leasing Company, its officers, agents, servants, employees and attorneys be restrained and enjoined from selling, offering for sale, or parting with, any of the capital stock of said company, or from working, extracting, selling or disposing of any of the ores or minerals from the Ironsides, Iron Mac and Beveredge Belle lode mining claims until the further order of the Court in the premises. [16]

5. That as soon as may be after the filing of the complaint herein, a receiver may be appointed by this Honorable Court, to go into possession of said mining claims and take charge of the same.

6. That a writ of subpoena be issued and directed to the said defendants, Kate J. Wells, Ironsides Mining Reduction and Leasing Company, Mrs. E. R. Shockman, George L. Arnold and C. J. Heckman, thereby commanding them, and each of them, at a certain time and under certain penalty therein limited, personally to appear before this Honorable Court, and then and there full, true and direct answers make, but not under oath, to all and singular the premises, and to stand, perform and abide by such order, direction and decree as may be made against them in the premises, as shall be meet and agreeable in equity.

7. That the plaintiff have such other and further relief as to the Court may decree meet and proper ; and for costs.

P. F. CARNEY,
WM. B. OGDEN,
Solicitors for Plaintiff.

State of California,
City and County of Los Angeles,—ss.

T. F. Turner, being first duly sworn, on oath deposes and says: That he is the plaintiff above named; that he has read the above and foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes them to be true.

Subscribed and sworn to before me this —— day of ——, 1914.

Notary Public. [17]

[Endorsed]: No. 45—Civil. In Equity. In the District Court of the U. S., for the Southern District of California, Northern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells and Ironsides Mining Reduction and Leasing Co., a Corporation et al., Defendants. Second Amended Bill of Complaint. Main 9152. 10317. P. F. Carney and William B. Ogden, 711 American Bank Building, Second and Spring Streets, Los Angeles, Cal., Attorneys for Plaintiff. Filed Apr. 18, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [18]

*In the District Court of the United States, for the
Southern District of California, Northern Divi-
sion.*

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS, IRONSIDES MINING RE-
DUCTION AND LEASING COMPANY, a
Corporation, MRS. E. R. SHOOKMAN,
GEORGE L. ARNOLD and C. J. HECK-
MAN,

Defendants.

Answer to Second Amended Bill of Complaint.

The joint and several answer of defendants Kate J. Wells and Ironsides Mining Reduction and Leasing Company to the second amended bill of complaint of T. F. Turner, the plaintiff.

These defendants respectively now and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said amended bill contained, for answer thereunto or to so much and such parts thereof as these defendants are advised it is material or necessary for them to make answer to, answering say: [19]

I.

That as to the allegation of the said amended bill that the plaintiff is a citizen and resident of the State of Massachusetts, these defendants have no knowl-

edge or belief in respect thereto and pray that strict proof of said allegation be required of the plaintiff.

II.

These defendants do not, nor does either of them have knowledge as to the truth of the allegations of the fifth paragraph of said amended bill.

III.

Answering the sixth and seventh paragraphs of said amended bill these defendants say that they and each of them are and is without knowledge as to whether the plaintiff and J. F. Creel mentioned in said bill, did furnish to A. W. Wells, therein mentioned, a prospecting outfit consisting of a team of mules, mining outfit, tools, supplies, provisions and money from time to time as needed, or any of such things, or whether, if such things or any of them were furnished by the plaintiff and said J. F. Creel or either of them to the said A. W. Wells, the same or any thereof were furnished or supplied in furtherance or pursuance of such contract as is set forth in the fifth paragraph of said bill of complaint, or in furtherance or pursuance of any contract or agreement entered into by plaintiff and J. F. Creel on the one part and A. W. Wells on the other. They admit, however, that said A. W. Wells did in the spring of 1907 go into Inyo County, State of California, with a prospecting outfit such as is described in said sixth paragraph, and did there make discoveries of mining ground and locations thereof in the name of the plaintiff, the said J. F. Creel and the said A. W. Wells, and designated the same as the Summit, Calahan, Don Creel, Extension and T. F. T., and that

such discoveries [20] and locations were made in what is known as the Beveredge Mining District. These defendants deny that the lode mining claims mentioned and described in said sixth paragraph as having been respectively located in the names of Kate J. Wells and B. T. Robinson, Mrs. A. W. Wells and B. T. Robinson, and B. T. Robinson and Harold E. Robinson, or any of them were or was discovered or located by the said A. W. Wells. Defendants deny that the said A. W. Wells wrote all or any of the location notices placed upon said several mining locations last mentioned, or that he performed all or any of the preliminary acts of location upon all or any of said last mentioned locations, or that the said A. W. Wells had such locations or any of them, or the notices of such locations or any of them, filed of record at Independence, Inyo County, California. These defendants deny that the said A. W. Wells did or performed any act or things incident or requisite to the location of said mining claims last mentioned, or any of them, under or pursuant to Local Mining Rules and Regulations, laws of the State of California, or the laws of the United States, in relation to the discovery, location, and appropriation of the public mineral lands of the United States, or that the said A. W. Wells did or performed any work or labor or other act or thing in reference to or in aid of the discovery or location or appropriation of said last mentioned mining claims, or any of them.

IV.

Answering the eighth paragraph of said amended bill these defendants admit that Kate J. Wells and

Mrs. A. W. Wells are names of one and the same person and that this defendant Kate J. Wells was at all times mentioned in the amended complaint and is now the wife of A. W. Wells, and that Harold E. Robinson and B. T. Robinson are sons of the defendant Kate J. Wells and the stepsons of A. W. Wells, but these defendants deny that [21] defendant Kate J. Wells, B. T. Robinson or Harold E. Robinson were or at all knew that the said A. W. Wells at the times the several mining locations last mentioned, or any of them, were located, was working under a grubstake contract or agreement of said A. W. Wells with plaintiff and said Creel, or with either of them; and these defendants deny that said last-mentioned mining locations or any of them were discovered or located by said A. W. Wells, or that they or any of them were wrongfully and fraudulently, or wrongfully or fraudulently made in the names of defendant Kate J. Wells, B. T. Robinson and Harold E. Robinson in pursuance of a conspiracy entered into between or among the said A. W. Wells, Kate J. Wells, B. T. Robinson and Harold E. Robinson, or any two of them, or for the purpose of defrauding the said Turner and Creel or either of them, of their or his rights under said supposed contract, or their rights or the right or rights of either of them under any contract or otherwise accruing to them or either of them; and these defendants deny any conspiracy among or between the said A. W. Wells, Kate J. Wells, B. T. Robinson and Harold E. Robinson, or any of them, to wrong or defraud the plaintiff and his said assignor or either of them, or any person whomso-

ever, or that the plaintiff and his assignor or either of them were or was defrauded by any act or thing done by the said B. T. Robinson and Harold E. Robinson and the defendant Kate J. Wells, or by any of them, in and about the discovery or location of the mining claims last mentioned, or any of them, and in this behalf these defendants aver that each and every of said last mentioned mining claims was discovered by B. T. Robinson, the son of Kate J. Wells, and the same and each of them was and were located in the names of defendant Kate J. Wells and said B. T. Robinson jointly, and the said [22] B. T. Robinson and Harold E. Robinson jointly, for themselves and as their own property—to each as shown by the several notices of location—and that the said A. W. Wells had no part in the discovery and location of said last-mentioned mining claims or any of them; that said last-mentioned mining claims were not, nor were any of them discovered or located by reason of, or pursuant to, or under any prospecting or grubstake contract, arrangement, or understanding between the plaintiff and J. F. Creel on the one side, and A. W. Wells on the other, if any such contract there was at the times of the several discoveries and locations thereof; that the said A. W. Wells never at any time, had any estate, right or interest in or to the said mining claims last mentioned, or any of them; and that the plaintiff and J. F. Creel never had, nor do they now have any estate, right or interest, legal or equitable, in or to the said last-mentioned mining claims, or any of them. These defendants further aver that the said last-mentioned

mining claims were discovered and located by B. T. Robinson, the son of the defendant Kate J. Wells, and that during all of the time within which said discoveries and locations were made by said B. T. Robinson, and while he, the said B. T. Robinson was engaged in and about the prospecting for and discovery and location of said last-mentioned mining claims and every of them, the defendant Kate J. Wells solely at her own charges, furnished the said B. T. Robinson with provisions and other supplies consumed and used by him during said period of time and with such money as he required for his personal expenses, in value and amount aggregating the sum of \$565 or thereabout, and that said provisions, supplies and money were furnished said B. T. Robinson by the defendant Kate J. Wells pursuant to an understanding and agreement between them that they, the said B. T. Robinson and the defendant Kate J. Wells should share [23] equally in all mining claims discovered and located by said B. T. Robinson while the defendant Kate J. Wells should supply him with provisions and such other supplies as he might reasonably require while prospecting for mineral bearing lodes in the region and district aforesaid, and according to such understanding and agreement the said last-mentioned mining claims and each of them were and was located by the said B. T. Robinson in his name and the name of the defendant Kate J. Wells and in the names of B. T. Robinson and Harold E. Robinson, and that yearly ever since the location of said mining claims, so as aforesaid made by the said B. T. Robinson up to and in-

cluding the year 1912, the defendant Kate J. Wells or her lessee, the defendant Ironsides Mining Reduction and Leasing Company has performed annual labor and made improvements to amount and value required by the laws of the United States upon each and every of said mining claims at her or its own charges. Touching the allegations in said eighth paragraph by way of excuse and explanation of plaintiff's failure to assert until the beginning of this suit ownership of an interest in said mining claims, these defendants are without knowledge, save that the plaintiff and the said J. F. Creel were in the said Beveredge Mining District in the summer of 1907 and that they never have been residents of said mining district which these defendants admit.

V.

Defendants admit that the legal title to said mining claims and every of them is in the defendant Kate J. Wells.

VI.

Answering the 11th and 12th paragraphs these defendants deny that the plaintiff is the equitable owner of an undivided two-thirds interest in and to said Golden Rule No. 2, lode [24] mining claim, or in and to the Ironsides lode mining claim, under or by virtue of any contract or agreement or otherwise, and they deny that the plaintiff has any interest, legal or equitable, in either the Golden Rule No. 2 lode mining claim or the Ironsides lode mining claim.

VII.

Answering the thirteenth paragraph of said

amended bill defendants admit that defendant Kate J. Wells has worked, mined and extracted and sold some valuable ore and mineral from said lode mining claims, but deny that the extraction and sale of said ores and minerals worked any damage whatever to the plaintiff.

VIII.

These defendants admit that defendant Ironsides Mining Reduction and Leasing Company is working and *purposes* to continue to work the mining claims leased by it and that it is its purpose to extract therefrom mineral bearing ores, if such shall be found of sufficient value and in sufficient quantity to warrant the extraction and marketing thereof, but deny that such extraction and sale will cause any damage whatsoever to the plaintiff.

IX.

These defendants deny that any fraudulent representations whatsoever have been made by any officer or agent or by the defendant Kate J. Wells as to the title of the property leased by the defendant Ironsides Mining Reduction and Leasing Company from the defendant Kate J. Wells, or that any purchaser of said stock, if any shall be sold, will be defrauded out of his money by any misrepresentation as to title of the property so leased, or by any misrepresentation whatever. [25]

X.

Defendants deny that the defendant Kate J. Wells is insolvent or that she has no other property than said mining locations.

XI.

Touching the allegations of the seventeenth paragraph of said amended bill of complaint as to an assignment by J. F. Creel of all his right, title and interest in the supposed prospecting contract in the amended bill pleaded, these defendants are without knowledge and cannot admit or deny said allegations, except that they do deny that by such assignment, if any there were, there passed to the said T. F. Turner any right, title, estate or interest of any nature or kind whatsoever in said last-mentioned mining claims or any of them.

XII.

Further answering to said amended bill of complaint these defendants say that at the respective dates of location of the several mining claims last mentioned and described in the sixth paragraph of the amended bill—as to each at the date of its location—the defendant Kate J. Wells and the said B. T. Robinson went into possession of each and every the said mining claims except the Iron Max, and as to the latter, **the locators thereof and predecessors** in interest of the defendant Kate J. Wells, the said B. T. Robinson and the said Harold E. Robinson went into the possession thereof and since hitherto the defendant Kate J. Wells and her predecessors in interest have been in the exclusive possession of all and singular the said last-mentioned mining claims openly and notoriously asserting and claiming title thereto under the locations thereof by the said [26] B. T. Robinson as aforesaid, and the defendant Kate J. Wells from year to year and every

year since the location of said several last-mentioned mining claims at her own cost has performed and caused to be performed upon or for the benefit of said several mining claims and every thereof the annual labor and improvement required by the laws of the United States in relation to mining claims located upon the public mineral lands. And that after the location of said several last-mentioned mining claims and before the exhibiting of the plaintiff's bill of complaint, the defendant Kate J. Wells in addition to her expenditures for annual labor and improvement as aforesaid, paid out and expended large sums of money, to wit, many thousands of dollars in the exploration, development and improvement of the said mining claims; yet the plaintiff and the said J. F. Creel, plaintiff's assignor, although they and each of them well knew as early as the summer or fall of the year 1907 that the said several mining claims last hereinbefore mentioned had been located in the names of the defendant Kate J. Wells and the said B. T. Robinson and the said Harold E. Robinson on the several dates specified in the sixth paragraph of the amended bill of complaint and that the defendant Kate J. Wells and the said B. T. Robinson, her predecessor in interest, as to a moiety of each of said last-mentioned mining claims, save the Iron Max, and the said B. T. Robinson and Harold E. Robinson, her predecessors in interest as to said Iron Max, were in the possession of all and singular the said mining claims, asserting and claiming title thereto, and that the defendant Kate J. Wells at her own cost was performing the annual

labor upon said claims required by law and was expending large sums of money in the exploration, development and improvement of all said last-mentioned claims, asserted no title, right, claim or interest in the same or any thereof, or any part or parcel thereof, until [27] the exhibiting of plaintiff's bill of complaint in this suit on the 2d day of December, 1912, and these defendants submit to the judgment of this Honorable Court whether, the premises considered, the plaintiff is not now barred by his laches from the relief prayed by his amended bill, or from any relief in equity.

XIII.

And these defendants by protestation, not confessing or acknowledging all or any of the matters or things in the said amended bill mentioned to be true in such manner and form as the same are therein and thereby set forth and alleged, do plead in bar, and by way of plea say, that, if the plaintiff and his assignor, or either of them, ever had any cause of suit for or concerning any the matters and things pleaded in the said amended bill of complaint, which these defendants do in no sort admit, the same was barred at the time of the exhibiting of the plaintiff's original bill of complaint herein; and in this behalf these defendants further for plea say and do aver that the defendant Kate J. Wells and her predecessors in interest and grantors entered into and upon and took possession of all and singular the several mining claims last herein mentioned at the respective dates of their location as shown in the sixth paragraph of the said amended bill, under

claim of title and right of possession exclusive of all other right and ever since to the time of the beginning of this suit, a period of more than five years, were in the actual, open, notorious, continuous, exclusive and uninterrupted occupation and possession of the said last-mentioned mining claims and each and every thereof and every piece and parcel thereof, claiming and enjoying the same during all the time aforesaid in their own sole and exclusive right as the sole and exclusive owners thereof (acknowledging only paramount title in the United States) to their own sole and exclusive use and not otherwise.

[28]

And these defendants by protestation, not confessing or acknowledging all or any of the matters or things in the said amended bill mentioned to be true, in such manner and form as the same are therein and thereby set forth and alleged, do further plead in bar thereunto and for further plea say, that the cause of action, if any there be, which these defendants do not admit, arising to the plaintiff on account of or by reason of the several allegations and complaints in his said amended bill contained did not accrue within three years next before the institution of this suit for that the plaintiff and his assignor, the said J. F. Creel, and each of them knew or ought to have known as early as the latter part of the year 1907, all and singular the acts and things done, and by whom done, in and about the discovery and location of the several mining claims which are the subject of this suit, and each of them, and all and singular the facts and circumstances relating

and pertaining to the discovery and location of the said last-mentioned mining claims and each thereof.

WHEREFORE, these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

S. E. VERMILYEA,

S. L. CARPENTER,

Solicitors for Defendants Kate J. Wells and Ironsides Mining Reduction and Leasing Company.

Received copy of foregoing answer this 2d day of June, 1914.

P. F. CARNEY,

WM. B. OGDEN,

Solicitors for Plaintiff. [29]

[Endorsed]: No. 45-Civil. In Equity. In the District Court of the U. S., for the Southern District of Cal., Northern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells and Ironsides Mining Reduction and Leasing Co., a Corporation, et al., Defendants. Answer of Defendants Kate J. Wells and Ironsides Mining Reduction and Leasing Company. S. E. Vermilyea, S. L. Carpenter, 1100-1002 Hibernian Building, Los Angeles, Calif., Attorneys for Defendants Kate J. Wells and Ironsides Mining Reduction & Leasing Co. Filed Jun. 2, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk, [30]

Minute Order of Court of Date, March 10, 1913.

*In the District Court of the United States, for the
Southern District of California, Northern
Division.*

IN EQUITY.**T. F. TURNER,**

Plaintiff,

vs.

**KATE J. WELLS, IRONSIDES MINING, RE-
DUCTION AND LEASING COMPANY, a
Corporation, Mrs. E. R. SHOOKMAN,
GEORGE L. ARNOLD and C. J. HECKMAN,
Defendants.**

**Order to Dismiss One Defendant, Mrs. E. B.
Shookman.**

This cause coming on to be heard on motion of Mrs. E. B. Shookman, one of the above-named defendants, to dismiss said defendant hence; and the motion having been duly considered, and it appearing that the plaintiff herein has failed and omitted to file a replication to the answer of said defendant, filed on the 2d day of January, 1913.

It is therefore ordered, in accordance with Equity Rule No. 66, that said defendant, Mrs. E. B. Shookman, is dismissed hence as party defendant in this action, with costs in her behalf incurred.

This order to be without prejudice to other parties in this action and to any proceedings heretofore had in this cause.

FRANK H. RUDKIN,

Judge. [31]

[Endorsed]: No. 45-Civ. In the District Court of the United States, for the Southern District of California, Northern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells, Ironsides Mining, Reduction and Leasing Company, a Corporation, Mrs. E. B. Shookman, George L. Arnold and C. J. Heckman, Defendants. Order to Dismiss One Defendant, Mrs. E. B. Shookman. Oliver S. Barnum, Solicitor, 519 Byrne Bldg., Los Angeles. Filed March 10, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy. [32]

At a stated term, to wit, the January Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, Held at the Courtroom Thereof, in the City of Los Angeles, on Tuesday, the Twenty-third Day of February, in the Year of Our Lord, One Thousand Nine Hundred and Fifteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 45-CIVIL, NORTHERN DIVISION.

T. F. TURNER,

Complainant,

vs.

KATE J. WELLS et al.,

Defendants.

Minute Order of Court of Date, February 23, 1915.

This cause coming on this day for final hearing in open court: William B. Ogden, Esq., appearing as counsel for complainant; S. L. Carpenter, Esq., and

W. H. Anderson, Esq., appearing as counsel for defendants; John P. Doyle being present as shorthand reporter of the testimony and proceedings, and acting as such; now, on motion of William B. Ogden, Esq., of counsel for complainant, it is ordered that Ralph E. Esteb, Esq., who is present in court, be, and he hereby is associated with said William B. Ogden, Esq., as counsel for complainant; and S. L. Carpenter, Esq., of counsel for defendants, having moved the Court for a continuance of this cause for said final hearing; it is by the Court ordered that said motion for a continuance be, and the same hereby is denied; and counsel for complainant having presented their motion for the production on this final hearing of certain letters and documents, and counsel for defendants having represented that no such letters or documents exist, said motion is thereupon withdrawn by counsel for complainant; and S. L. Carpenter, Esq., of counsel for defendants, having suggested to the Court the death of George S. Arnold, [33] one of the defendants herein, now, on motion of said counsel for defendants, it is ordered that Belle W. Arnold, executor of the estate of said George S. Arnold, deceased, be, and he hereby is substituted as a party defendant herein in the place and stead of said defendant George S. Arnold; and S. L. Carpenter, Esq., of counsel for defendants, having moved the Court to dismiss the amended bill of complaint in this cause, which motion is argued, in support thereof, by S. L. Carpenter, Esq., of counsel for defendants, and in opposition thereto by Wm. B. Ogden, Esq., of counsel for complainant, and in

support thereof in reply by S. L. Carpenter, Esq., of counsel for defendants; it is ordered that defendants' said motion to dismiss the amended bill of complaint be, and the same hereby is denied; and, in support of the issues on his side, T. F. Turner, the complainant, having been called and sworn as a witness in his own behalf, and having given his testimony; and, in connection with the testimony of said witness, complainant having offered the following exhibits, which are admitted in evidence in his behalf, to wit: Complainant's Ex. "A," Letter of 6/30/07, Wells to Creel and Turner; Complainant's Ex. "B," Letter of 12/26/07, Wells to T. F. Turner; Complainant's Ex. "C," Notice of Location by A. W. Wells, dated 8/17/07; Complainant's Ex. "D," Notice of Location by A. W. Wells, of 8/17/07, Complainant's Ex. "E," Notice of Location by A. W. Wells of 6/28/07; Complainant's Ex. "F," Notice of Location by A. W. Wells, of 6/28/07; Complainant's Ex. "G," Notice of Location by Turner-Creel, of 6/10/07; Complainant's Ex. "H," Notice of Location by A. W. Wells, of 6/10/07; Complainant's Ex. "I," Notice of Location by J. F. Creel, of 6/10/07; Complainant's Ex. "J," Notice of Location by Turner-Creel, of 6/10/07; Complainant's Ex. "K," Letter of 5/1/08, Wells to Turner; Complainant's Ex. "L," Letter of 2/11/12, Wells to Turner & Creel; and Complainant's Ex. "M," Assignment of 5/15/12, Creel to Turner; and Court, at the hour of 12:30 o'clock P. M., having taken a recess until the hour of [34] 2 o'clock P. M., of this day;

And now, at the hour of 2:15 o'clock, P. M., court

having reconvened; and counsel and shorthand reporter being present as before; and T. F. Turner, the complainant, a witness in his own behalf, having resumed the stand for further examination, and having given his testimony; and, in connection with the testimony of said witness, complainant having offered the following exhibits, which are admitted in evidence in his behalf, to wit:

Complainant's Ex. "N," Certified Copy of Notice of Location of 8/1/07, by Benjamin T. Robinson; Complainant's Ex. "O," Certified Copy Notice of Location of 8/17/07 by Benjamin T. Robinson; Complainant's Ex. "P," Certified Copy of Notice of Location of 7/5/07, by Miss A. W. Wells; Complainant's Ex. "Q," Certified Copy of Notice of Location of 7/5/07, by Miss A. W. Wells; Complainant's Ex. "R," Certified Copy of Notice of Location of 6/25/07, by B. T. Robinson; Complainant's Ex. "S," Certified Copy of Notice of Location of 8/20/07, by Benjamin T. Robinson; Complainant's Ex. "T," Certified Copy of Notice of Location of 8/20/07, by Benjamin T. Robinson; Complainant's Ex. "U," Certified Copy of Notice of Location of 7/29/07, by Benjamin T. Robinson; and Complainant's Ex. "V," Certified Copy of Notice of Location of 6/29/07, by A. W. Wells; and complainant, further in support of the issue on his side, having called as witnesses Benj. F. Godfrey, Mrs. Delia Miles, W. B. Redfield and J. F. Creel, who are duly sworn and give their testimony; it is, on motion of W. H. Anderson, Esq., of counsel for defendants Geo. L. Arnold and C. J. Heckman, and with the consent of Wm. B. Ogden, Esq., of coun-

sel for complainant, ordered that this cause be, and the same hereby is dismissed as to said defendants Geo. L. Arnold and C. J. Heckman; and it is further ordered, at the hour of 5 o'clock P. M., that this cause be, and the same hereby is continued for further hearing until Wednesday, the 24th day of February, 1915, at [35] 10 o'clock A. M.

[Endorsed]: No. 45-Civil. United States District Court, Southern District of California, Northern Division. T. F. Turner, Complainant, vs. Kate J. Wells et al., Defendants. Copy Order Substituting Party Defendant; also Dismissing as to Defendants Arnold and Heckman. Filed Mar. 17, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [36]

In the District Court of the United States, for the Southern District of California, Northern Division.

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS, IRONSIDES MINING REDUCTION AND LEASING COMPANY, a Corporation, MRS. E. R. SHOOKMAN, GEORGE L. ARNOLD and C. J. HECKMAN,

Defendants.

Final Decree.

This cause came on to be heard at the January, 1915, term at Los Angeles, conformably to stipula-

tion of parties, on the matters in issue between the plaintiff and the defendants Kate J. Wells and Ironsides Mining Reduction and Leasing Company (the other defendants—Mrs. E. R. Shookman by order of March 10, 1913, and George L. Arnold and C. J. Heckman by order at the hearing—having been dismissed out of said suit) and was submitted without argument by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the plaintiff's second amended bill of complaint do stand dismissed out of this court with costs for the defendants.

BENJAMIN F. BLEDSOE,

District Judge. [37]

Clerk's costs taxed at \$20.40.

Dated March 13, 1915.

Decree entered and recorded March 13th 1915.

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk.

[Endorsed]: No. 45—Civil. In Equity. In the District Court of the U. S. for the Southern District of Cal. Northern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells and Ironsides Mining Reduction and Leasing Co., a Corporation, et al., Defendants. Decree. S. E. Vermilyea, S. L. Carpenter, 1100—1102 Hibernia Building. Los Angeles, California, Attorneys for Defendants. Filed Mar. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [38]

Defendants' Exhibit 1.
GENERAL MERCHANDISE.
78108.

LE COUNT BROS., Co., INC.,
San Francisco, Cal.

Amt. of Acct.....15.98

Recd payment (16.00) June 8, 1907.

T. BOLAND EST.

Per J. R. BEAN.

(Small torn piece of paper attached, reading:)

June 7 1907

nson

s Boland

aler in

Part of Defd. Ex. 1-G.

BB. 997452. Wells Fargo & Co., Money Order.
Remitter's Receipt. Keep it. Amount of Order,
\$14. Sent to B. T. Robinson. Purchased by Kate
J. Wells. 10/14/07. In the event of delay or loss
of the order the amount will be refunded on pres-
entation of THIS RECEIPT and the execution of
an agreement to refund.

Los Angeles, Cal. ———(?) Street Branch.

Pt. of Defd. Ex. 1-G. (On rear). Part of Defd.
Ex. 1-G.

BB. 984475. Wells Fargo & Co. Money Order.
Remitter's Receipt. Keep it. Amount of Order,
\$10.00. Sent to T. Boland Estate. Purchased by
K. J. Wells, Los Angeles, Cal. Oct 5, 1907. In the
event of delay or loss of the order, the amount will

be refunded on presentation of THIS RECEIPT and the execution of an agreement to refund.

Part of Defd. Ex. 1-G. [39]

BB. 984474. Wells Fargo & Co. Money Order. Remitter's Receipt. Keep it. Amount of Order, \$50.00. Sent to T. Boland "Estate." Purchased by K. J. Wells, Los Angeles, Cal. Oct 5, 1907. In the event of delay or loss of the order, the amount will be refunded on presentation of THIS RECEIPT and the Execution of an Agreement to Refund.

[Endorsed]: Part of Exhibit No. 1-G.

Los Angeles, Cal., 7/29/1907, No. 18.
STATE BANK & TRUST CO.,
of Los Angeles.

Pay to the order of R. L. Craig & Co., \$33.95/100,
Thirty-three 95 Dollars.

KATE J. WELLS.

(Canceled.) Paid.

[Endorsed]: Part of Defd. Ex. No. 1-G. Clearing-house No. 10. Paid State Bank & Trust Co., Jul. 30, 1907. Through L. A. Clearing-house 10.

Los Angeles, Cal., 6/26/1907, No. 15.
STATE BANK & TRUST CO.,
of Los Angeles.

Pay to the order of Canfield Hardware Co.,
\$2 25/100, Two and 25/100 Dollars.

KATE J. WELLS.

[Endorsed]: Pay to the order of The Citizens National Bank, Los Angeles, Cal. Canfield Hardware Co. Pay only through L. A. Clearing-house. Jul.

31, 1907. 11. To the Citizens Nat'l Bank. Part of Defd. Ex. No. 1-G.

Clearing-house No. 10. Paid State Bank & Trust Co. Jul. 31, 1907. Through L. A. Clearing-house 10. [40]

Los Angeles, Cal., 4/12/1907, No. ——.
STATE BANK & TRUST CO.,
of Los Angeles.

Pay to the order of Fairbanks Morse & Co., \$50 85/100, Fifty and 85/100 Dollars.

KATE J. WELLS.

Clearing-house No. 10.

[Endorsed]: Part of Defd. Ex. 1-G. Pay to the order of The American Natl. Bank of Los Angeles. Fairbanks, Morse & Co. Pay only through Los Angeles Clearing-house 8. Apr. 15, 1907. 8 to The American Natl. Bank. Paid.

Los Angeles, Cal., 4/11 1907, No. ——.
STATE BANK & TRUST CO.,
of Los Angeles.

Pay to the order of R. L. Craig & Co., \$73 25/100, Seventy-three 25/100 Dollars. —

KATE J. WELLS.

Clearing-house No. 10.

OK. AR.

[Endorsed]: Part of Defd. Ex. 1-G. R. L. Craig & Co. W—.

(In pencil on back): 73.25
186.15

Paid Apr. 12, 1907. State Bank & Trust Co., Los Angeles. Cal.

Los Angeles, Cal., 4/12 1907, No. ——.
 STATE BANK & TRUST CO.,
 of Los Angeles.

Pay to the order of Union Hardware & Metal Co.,
 \$22.27/100, Twenty-two and 27/100 Dollars.

KATE J. WELLS.

Clearing-house No. 10.

[Endorsed]: Part of Defd. Ex. 1-G. Pay to the
 order of Merchants National Bank, Los Angeles, Cal.
 Union Hardware & Metal Co. A. Williams, Cashier.
 Paid through Merchants National Bank, Los An-
 geles, Clearing-house 5. (F.) Apr. 15, 1907. [41]

Los Angeles, Cal., 4/11, 1907, No. ——.
 STATE BANK & TRUST CO.
 of Los Angeles.

Pay to the order of Union Hardware & Metal Co.
 \$40.50/100, Forty and 50/100 Dollars.

KATE J. WELLS.

Clearing-house No. 10.

[Endorsed]: Part of Defd. Ex. No. 1-G. Pay to
 the Order of Merchants National Bank, Los Angeles,
 Cal. Union Hardware & Metal Co. A. Williams,
 Cashier. Paid through Merchants' National Bank,
 Los Angeles Clearing-house 5. Apr. 15, 1907. (F)
 1101 W. 1st St.

Oct. 4, 1907.

Received from Mrs. K. J. Wells Sixty Dollars on
 acct. Robinson & Wells \$60.00.

T. BOLAND ESTATE.

BEAN.

[Endorsed]: Part of Defd. Ex. 1-G.

Los Angeles, Cal., April 15, 1907, No. —.

STATE BANK & TRUST CO.

of Los Angeles.

Pay to the order of Dyas Cline Co. \$11.75/100,
Eleven and 75/100 Dollars.

KATE J. WELLS.

Clearing-house No. 10.

[Endorsed]: Part of Defd. Ex. No. 1-G. 1101
West 1st St. Pay to the order of Broadway Bank
& Trust Co., Los Angeles, Cal., Dyas-Cline Sporting
Goods Co. Paid. Pay only through L. A. Clearing-
house 14. Apr. 17, 1907. 14. To Broadway Bank
& Trust Co. [42]

Los Angeles, Cal., April 15th, 1907, No. —.

STATE BANK & TRUST CO.

of Los Angeles.

Pay to the order of R. L. Craig & Co. \$5.00/100
Five and no/100 Dollars.

KATE J. WELLS.

Clearing-house No. 10.

[Endorsed]: Part of Defd. Ex. No. 1. Pay to the
order of First National Bank of Los Angeles, Cal.,
R. L. Craig & Co. Paid Apr. 16, 1907. First Na.
tional Bank. Los Angeles Clearing-house 3 M. 2.

Keeler, Cal., May 24th, 1907.

M. B. T. Robinson to Thomas Boland, Dr., General
Merchandise, Full Line of Mining Supplies
Always on Hand, Boots and Shoes, Hats and
Caps, Complete Stock of Gents' Furnishings,
Keeler, Inyo Co., Cal.

1907.

Apr. 28.	Mdse. as per Bill.....	4.62
May 4.	“ “ “ “	8.60
“ 10.	“ “ “ “	2.00
“ 13.	“ “ “ “	1.35

16.57

May 17th, 1907.

Received payment in full.

T. BOLAND ESTATE,

Per J. R. BEAN.

[Endorsed]: 45-Civ. Turner & Wells. Defd's.
 Exhibit No. One. Filed Febry. 24, 1915. Wm. M.
 Van Dyke, Clerk. By T. F. Green, Deputy. [43]

*In the District Court of the United States, Southern
 District of California, Southern Division.*

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS et al.,

Defendants.

**Condensed Statement of Witness' Testimony in
 Narrative Form.**

The following comprises a statement of the testimony of witnesses examined on the trial of the above cause in narrative form, essential to the decision of the questions presented by the appeal, as follows:
 [44]

Testimony of T. F. Turner, in His Own Behalf.

T. F. TURNER, plaintiff herein, testified in his own behalf, in substance, as follows:

I am the plaintiff in this cause. I resided in Rhyolite, Nevada, in 1907, and became acquainted with J. F. Creel at that place about January, 1907, and some time in the following February became acquainted with A. W. Wells. I met him in Creel's cabin. Creel and I were batching together. Wells was a prospector and miner. Wells talked much of prospecting and wanted Creel and myself to grubstake him on a prospecting trip. Creel and I agreed to grubstake Wells and did so, furnishing him with mule team, wagon, outfit, provisions and money. He wanted to take his step-son, Burgess T. Robinson, with him, but we refused to include him in the grubstake contract because he was not of age. Wells however, was to take him with him on his own account, and settle with him out of his proceeds in the grubstake contract. The grubstake contract was oral. There were present at the making of this grubstake contract a Mr. Smith, a man by the name of Whitney, B. T. Robinson, Creel and myself. Under the grubstake agreement Wells, Creel and myself were to share equally, one-third each, Burgess Robinson, the step-son, was to accompany Wells, and Wells was to remunerate him out of his share. They were to go into California and prospect for gold and other precious metals, and all discoveries were to be located as claims in the names of Wells, Creel and myself. This contract was made between us in March,

(Testimony of T. F. Turner.)

1907, and Wells and Robinson left for California about the 2d, 3d or 4th of following April, 1907. They were destined for a locality in the neighborhood of Keeler, Inyo County, California. [45]

(The above evidence as to the grubstake contract was objected to by defendants because they were declarations against wife, objection overruled and an exception allowed defendant.)

We received letters from Wells enroute, and after he arrived at Keeler, California. We heard from him frequently and sent him money from time to time, as often as he asked for it. At times I sent him money, other times he would write for it and at other times I sent him money by Mr. Creel.

I next saw Wells the latter part of July about the 22d or 23d, 1907, and he stated that he had left Burgess Robinson at work over where they had been prospecting, monumenting our claims.

(The statement as to Burgess Robinson being left at work was objected to by defendants because there was no allegation to connect Burgess Robinson with the grubstake contract. Objection overruled, and an exception allowed defendant.)

Wells remained two or three days and returned to Keeler, California. After that he wrote us every week. In one letter he enclosed us the location notices of the following claims: T. F. T., Don Creel, Stone, Callahan and Summit. He sent others, the Black-metal, Combination and Sunset.

(Letter enclosing location certificates objected to by the defendants as incompetent and irrelevant, ob-

(Testimony of T. F. Turner.)

jection overruled and exception allowed defendants.)

These location certificates were in the handwriting of Burgess Robinson. Wells wrote letters relative to the contract, showing the existence of friendly relations, up to as late as May 1, 1908. I was at Camp Burgess about the 18th or 20th of September, 1908. Wells wrote me to come and take the mules away. M. C. Kyle Smith went with me. I paid bill for mules' keep and sold them. Wells, Smith and myself went on the claims located in the names of Creel, Wells and myself. Smith was a mining expert. I did not think the showing sufficient to justify an [46] expenditure of more money. Smith said to Wells, "There are those other claims that you showed me, the Ironsides and the Ketchem Mack." * * * "If those were in that group I could report favorably upon the property." Wells said, "I can't do that, Turner, those claims have been located by my wife for six years."

(The foregoing statement of Wells as to properties having been located by his wife for six years, objected to by defendants, because any statement or declarations of Wells regarding the property involved in this controversy could not be admissible, Objection overruled and an exception allowed defendants.)

That ended the conversation and I left for Tonopah, Nevada, and never returned to Inyo County, California. In the fall of 1911, in Nevada, I overheard a conversation and asked some questions the answers to which indicated that Wells was interested

(Testimony of T. F. Turner.)

in valuable claims near Keeler which were understood to have been located on a grubstake.

(The foregoing conversations objected to by defendants as irrelevant and immaterial and that defendants cannot be bound by conversations heard somewhere in Nevada,—objection overruled. The Court admitted the conversations solely to show the first intimation of fraud and as exculpating the plaintiff from the charge of undue delay or laches which had been urged against him. An exception was allowed defendants.)

I immediately wrote Creel at Tucson, Arizona, and sent him money to go to Inyo County, California, and investigate.

(The statement that Turner sent Creel money to look up the records, objected to as incompetent, irrelevant and immaterial. Objection overruled and exception allowed defendants.)

I met Creel afterwards. He had been to Inyo County, California, and he brought me a letter from Mr. Wells, as follows: [47]

**Plaintiff's Exhibit "L"—Letter of 2/11/12, Wells
to T. F. Turner and J. F. Creel.**

Lone Pine, Calif., Feby. 11th, 1912.

Mr. T. Frank Turner,
Boston,
Mass.

Mr. J. F. Creel,
Los Angeles,
Cal.

Gentlemen:

Pursuant to your request regarding the grubstake agreement had between yourselves and myself I herewith attached a complete statement of our relations with each other as relates to that agreement and the carrying out of the same.

That on or about the first day of March, 1907, I came down from Goldfield to the home of J. F. Creel in Rhyolite, and remained there *for* a period of days with him, being at the time badly troubled with the rheumatism in one of my legs.

During my stay there with him we talked many times of the possibilities of mining and the chances a person would have in some country in California in which I had had quite a little experience, and that upon the many occasions with Mr. Turner, Mr. Creel and others present, viz., E. Prichard Smith, Mr. Gad-fry, Major C. W. Callahan and Ed. Whitney, relative to my going into the field to discover some ground containing mineral in the interest of yourselves and myself.

That it was finally agreed verbally between us and

in the presence of the above-named parties and on occasions of others that I would go out for you provided you furnished me with a proper means of travel and that I would prospect and explore the country to the best of my ability and at all times [48] to the interest of the three of us connected with the same, no limit of time being set upon the length of time of the life of the grubstake or agreement.

That it was finally agreed that you would secure and later did secure a two mule team and light road wagon in which I was to start on the trip, that you also provided equipment and tools, feed and supplies for myself and team.

That then came the question of taking Burgess Robinson along to help me in my work to carry out my agreement with you, and which was consented to by both of you. I went to Chloride Cliff in Inyo County, Calif., on the Funeral Range of Mountains and there explained to the said Burgess Robinson in detail regarding the trip and he was agreeable to the same and at once accompanied me to the home of J. F. Creel in Rhyolite, Nevada, and it was further agreed in the presence of ourselves and several of the above-named witnesses that Burgess Robinson was to accompany me on the trip to help me.

That it was also understood and agreed that the terms of the agreement was not altered except that Burgess was not to participate in the same only to the extent of whatever interest I myself might obtain from whatever was discovered or located.

That the fact being known at the time by all concerned that the said Burgess Robinson being my son

in law by marriage to Kate J. Robinson and the further fact that he being a minor under the age of twenty-one years of age, the matter of making an agreement with a minor not seeming possible we would not make him a party to the agreement otherwise than stated. [49]

That during the later part of March, 1907, after everything was in readiness, we picked up A. I. Warren, then of Lees Camp, Inyo County, California, who accompanied us as far as Skidoo, Calif., on agreement to secure an option on a lead and silver property then owned by one John Lamoine, and if possible to proceed to Los Angeles, or any other place and to dispose of the same for the benefit of himself and the ones connected with this agreement.

That on or about the 19th day of March, 1907, we took leave of your presence and proceeded forth to prospect and discover and otherwise secure mineral rights by any means possible and legal, but always to the interest of the parties connected with the agreement.

That we proceeded across the Death Valley stopping at Skidoo, California, for a short time where we left A. I. Warren and Burgess Robinson and myself proceeded through the way of Ballerat, Warwin to Keeler, Calif., and from there into the White Mountains by the way of Swansea, a station of the N. & C. R. R., and then and there prospected for mineral ground, that we discovered and located several claims near to the station of Swansea known as the Combination, Black *Meatl*, Sunset, and the

South Extension of the Black Metal, notice of which was made and later recorded in the office of the County Recorder at Independence, Calif.

That we then proceeded further into the mountains and there discovered numerous claims on the summit of the mountains and in what is known today as the Camp of Burgess.

That we located in the names of J. F. Creel, T. F. Turner, and A. W. Wells, the claims known and recorded as the Summit, Callahan, Don Creel, T. F. T. and the Extension, said claims being in the Canyon known as the Craig Canyon through which [50] passes the well known Hunter trail.

That on June 7th, 1907, we located and discovered what is known as the Golden Rule No. 2, as shown in the Mining Records in Book "Z," page 510, in the Office of the Recorder at Independence, Inyo county, Calif.

That on the 8th day of June, 1907, we discovered and located the claim known as the Golden Rule No. 3, as recorded in the Recorder's office at Independence, Inyo County, Calif., in Book "1," page 274.

That on June 22d, 1907, we discovered and located the claim known as the Ironsides, and recorded in book "Z," page 509, in the office of the Recorder at Independence, Inyo County, Calif.

That on June 22d, 1907, we also discovered and located the claim known as the Catch-em-Mac as shown of record in book "1," page 276, in the Recorder's office at Independence, Inyo County, Calif.

That on the 15th of July, 1907, we discovered and located the claim known as the Grand View, as

shown of record in book "1," page 545, in the Recorder's office, at Independence, Inyo County, Calif.

That on July 29th we discovered and located the claim known as the Kate J., as shown of record in book "1," page 546, in the Recorder's office of Independence, Inyo County, Calif.

That on August 1st, 1907, we discovered and located the claims known as "Garnet Fraction" as shown of Record in the Recorder's office at Independence, Inyo County, California, in book "1," page 545.

That on August 17th, we discovered and located the claims known as the Golden Rule No. 1, as shown book "1," page 547 in the Recorder's office at Independence, Calif. [51]

That on July 29th, 1907, we discovered and located the claims known as the Golden Rule No. 1, as shown in book "6," page 578, in the Recorder's office at Independence, Inyo County, Calif.

That on July 29th, we further located the claim known as the Protection No. 1, as shown in the records of the Recorder at Independence, Inyo County, Calif.

That we also located and discovered at and during this period of time the claim known as the Braca Bronco, a record of which I have not now in my possession.

That at no time from the beginning of this agreement prior to August, 1907, was Kate J. Wells on the claims now in the County of Inyo, Calif., but that sometime about the 1st of August, 1907, or during that month she arrived from Los Angeles and made

her first appearance on the hill.

That Harold E. Robinson arrived on the Hill during the month of June, 1907, and was not in any way connected with this agreement nor in the location of these claims.

That at no time for several years prior to our arrival on the hill, as stated, was any of these claims located by myself or any one of the present occupants, in whose names they appear.

That during the location of the Kate J. claim there arose quite an argument between Kate J. Wells and Burgess Robinson, and I said this is too much for me so I started for the Camp to get away from the argument, and in going over the ground I remember stumping my foot over an outcrop and kicked off a piece of the rock, and upon examining the same I found it to be well mineralized and that when they arrived at the Camp after making up I said to them, while you folks were fussing I made a discovery [52] and showed it to them and they went up in the air about it, and we then went back and located the claim and did some work on it.

That to my certain knowledge in this case the location notice was dated back to suit the occasion and the circumstances.

That all claims were located in the names of Kate J. Wells, Mrs. A. W. Wells and Burgess Robinson, my name not appearing on any of them, and that in every instance where the name appears as Mrs. A. W. Wells I personally wrote the location notice myself.

That in making this statement to you I have not

been offered nor have I received any remuneration of any kind from either of you, and it is only done with the intent and purpose of putting you in a proper position to secure your rights under the agreement on the hill, to which so far you have been wrongfully detained.

And further that I will be willing and will at any and all times make oath to the effect that every word here is true, if called upon to do so, and will appear in any Court of Record and give the facts as they exist to my best recollection and belief.

Yours truly,

(Signed) A. W. WELLS. [53]

(The above letter offered and received in evidence objected to by defendants as incompetent and irrelevant, having no tendency to prove the issues and because it *w* is a declaration of Wells long after the transaction, and a declaration in his own interest and a declaration of the husband which cannot be used against the wife, objection overruled and letter admitted solely for the purpose of showing the existence of the grubstake contract. Defendant excepted and an exception allowed.)

I first met Mrs. Kate J. Wells in January, 1913, in the Hollenbeck Hotel. We discussed this suit which was being brought, she asked if I had a suit for an accounting and I said I had. "Well," she said, "Mr. Turner I had rather have you for a partner than my husband," and stated if I got all that belonged to me up there I would have pretty nearly all the hill.

I sent Wells between \$2,100 and \$2,300 all told from the time I bought the mules up to the 4th day

of May, 1908, and paid the bill for the mules when I went up. Prior to the bringing of this action I purchased Mr. Creel's interest in the property in controversy, and took his assignment thereof (which is offered in evidence and admitted). [54]

Mr. Ogden, on behalf of plaintiff, here offered in evidence the location certificates to the lode mining claims described in plaintiff's Second Amended Bill of Complaint, located in the Beveridge Mining District, Inyo County, State of California, as follows:

Ironsides claim, located June 22, 1907, recorded in book C, page 509, records Inyo County, California, said location having been made in the name of Mrs. A. W. Wells and B. T. Robinson; Iron Max claim, located June 28, 1907, recorded in book 1, page 277, records Inyo County, California, said location having been made in the names of B. T. Robinson and Harold N. Robinson; Beveredge Belle claim, located August 17, 1907, recorded in book 1, page 547, records Inyo County, California, said location having been made in the names of Mrs. Kate J. Wells and B. T. Robinson; Catch-em-Mac claim, located June 22, 1907, recorded in book 1, page 276, records Inyo County, California, said location being made in the names of Mrs. A. W. Wells and B. T. Robinson; Garnet Fraction claim, located August 1, 1907, recorded in book 1, page 545, records of Inyo County, California, said location being made in the names of Mrs. A. W. Wells and B. T. Robinson; Golden Rule No. 1 claim, located July 29, 1907, recorded in book 6, page 587, records of Inyo County, California, said location having been made in the name of Mrs. A. W.

Wells and B. T. Robinson; Kate J. claim, located July 29, 1907, recorded in book 1, page 546, records of Inyo County, California, said location having been made in the name of Kate J. Wells and B. T. Robinson; Golden Rule No. 2 claim, located June 7, 1907, recorded in book 2, page 510, records of Inyo County, California, said location having been made in the names of Mrs. A. W. Wells and B. T. Robinson; Golden Rule No. 3 claim, located June 8, 1907, recorded in book 1, page 274, records of Inyo County, California, said [55] location being made in the names of Mrs. A. W. Wells and B. T. Robinson; Grand View claim, located July 15, 1907, recorded in book 1, page 545, records of Inyo County, California, said location having been made in the names of Mrs. A. W. Wells and B. T. Robinson; Protection No. 1 claim, located July 29, 1907, recorded in book 6, page 589, records of Inyo County, California, said location being made in the names of Mrs. A. W. Wells and B. T. Robinson.

Each of the above located certificates, with the exception of the Iron Mac and the Golden Rule No. 1, were witnesses by A. W. Wells and recorded with the recorder of Inyo County, California, at the request of said A. W. Wells. [56]

Testimony of Benjamin T. Godfrey, for Plaintiff.

BENJAMIN T. GODFREY, a witness for plaintiff, testified in substance as follows:

I reside in Seattle, Washington, and am mining engineer. I resided in Rhyolite, Nevada, in 1907, and knew plaintiff Turner and was well acquainted

(Testimony of Benjamin T. Godfrey.)

with J. F. Creel and lived with them. While with them I became acquainted with A. W. Wells, a prospector. I was present and heard certain conversations between Wells, Turner and Creel. Turner and Creel were to grubstake him and pay all bills and Wells, Turner and Creel were to have a one-third interest each in whatever Wells discovered. Mr. Turner agreed to buy an outfit. I knew Burgess T. Robinson when Turner and Creed decided to send Wells out to prospect. Wells did not want to go alone and wanted to take Robinson. Turner and Creel agreed providing Wells was to share with Robinson on his portion. It was agreed that Turner, Creel and Wells were to have one-third interest each in the presence of Burgess Robinson and it was agreeable to him. I was in Rhyolite when Wells came back in July, 1907. He was alone.

Cross-examination.

I came to Los Angeles last night at Mr. Turner's request and he is paying my expenses while here. The conversations I refer to took place in the evening, some time the first part of March, 1907. I saw the outfit leave Rhyolite. It consisted of two mules, one a gray mule, a light *right* wagon. I helped load it with groceries—flour, beans, bacon and usual camp stuff. It was a pretty good sized grubstake. [57]

Testimony of Mrs. Della Miles, for Plaintiff.

Mrs. DELLA MILES, witness for plaintiff, testified in substance as follows:

I am housekeeper at Baltimore Hotel in Los

(Testimony of Mrs. Della Miles.)

Angeles, California. I resided in Los Angeles in 1907, and was acquainted with defendant, Kate J. Wells.

In the Spring of 1907, Mrs. Wells came to my house and said some parties in Rhyolite had furnished an outfit for Wells and Burgess to go up to the camp and she had instructed them to locate everything up there. (This last paragraph objected to by defendant's counsel. Objection overruled and an exception allowed).

I will get you to state if you saw Burgess Robinson after you went up there, shortly after the 12th of July.

I saw him every day.

Did you have any conversation with Burgess Robinson in relation to the grubstake contract between Wells and Creel and Turner?

A. I did.

State what that was, Mrs. Miles.

Mr. CARPENTER.—Now, we object, if the Court please, on the ground that it is entirely irrelevant and immaterial, and purely hearsay; nothing that could be said by Burgess T. Robinson would bind the defendant Kate J. Wells, or the Ironsides Mining & Leasing Company, or any of the defendants in this case. * * *

The COURT.—B. T. Robinson appears to have been one of the locators in each one of these claims, and therefore, presumably, a half-owner in each one of the claims in question, and I apprehend that any statement or admission with respect to the title

(Testimony of Mrs. Della Miles.)

made by him while he was the owner of the claim would be competent against a subsequent grantee. That is my understanding of the law. The objection is overruled. Exception allowed. [58]

By Mr. ESTEB.—You may state what that conversation with Burgess T. Robinson was.

This conversation was along, I should say, the first of September. I came up the 12th of August and this must have been about the 1st of September, after I came there. There had been some trouble down to the camp, and Burgess came up and said that he was going to get out of there, that Wells and his mother was raising so much fuss that Creel and Turner would come in and take the whole thing anyhow as soon as they heard of it.

Mr. ANDERSON.—I move to strike that out as not responsive to the question.

The COURT.—Yes, it will be stricken out. It is immaterial. To the striking out of the above conversation by the Court defendant excepted and exception allowed.

Testimony of W. D. Redfield, for Plaintiff.

W. D. REDFIELD, a witness for plaintiff, testified in substance as follows:

I reside in San Francisco. I resided at Camp Burgess in 1909, and worked for Mr. Robinson and Mrs. Kate Wells. I had a conversation with Mrs. Kate Wells in 1909 in which she told me that she was in Los Angeles when Wells and Burgess left Rhyolite, Nevada, and that Burgess was not known in the grubstake contract with Creel and Turner.

(Testimony of J. F. Creel.)

I had another conversation with Mrs. Wells in 1910 about the time Mr. Warren and Wells brought suit against Mrs. Wells and she said, "They say they are going to break me, and if Warren don't win this suit Turner and Creel will come in. Wells will never get a cent out of this mine as long as I am here. I would rather Creel and Turner would have it than have Wells to have a nickel of it." [59]

Testimony of J. F. Creel, for Plaintiff.

J. F. CREEL, a witness for plaintiff, testified, in substance, as follows:

I reside in Bakersfield, California, and am working for an oil company. I resided in Rhyolite, Nevada, in 1907, and first became acquainted with T. F. Turner in January of that year. Turner lived with me in a two-room house. We lived together for a year or two at Rhyolite and Tonopah. Was acquainted with A. W. Wells. I met him at Rhyolite. He lived at my house while in Rhyolite. Mr. Turner and I had several conversations with Wells in which we agreed to grubstake him on a prospecting trip to California. We were to share equally as to what he should find on the prospecting trip. Turner and myself were to and did furnish outfit, grub and money at intervals as he needed them. Wells said he did not want to go to the mountains along and wanted to take Burgess Robinson, his stepson, with him. I stated to Burgess Robinson that he was not a part to the contract, and that he had no share in it except as to the share of Wells,

(Testimony of J. F. Creel.)

and Robinson said he understood that, and that it was satisfactory to him.

They shortly left Rhyolite for Inyo County, California, and we heard from them enroute from Ballerat or Darwin and Skidoo, and quite often from Keeler after their arrival in Inyo County, California.

Wells returned to Rhyolite about the 23d of July, 1907, at my request, bringing samples of ore with him. Wells remained two days and returned to Keeler, Inyo County, California.

I next saw Wells at Keeler the first part of September, 1907; and we went to Camp Burgess.

I am acquainted with Mrs. Wells, met her in 1908, and had a conversation with her in the presence of Wells, in relation to the claims in controversy, and she said, "Creel, I want to tell [60] you that one corner of your Don Creel claim overlaps my Beverage Belle," and I replied, "Mrs. Wells, I don't know anything about that, the monuments on the Don Creel or any of the rest of the claims. Mr. Wells located these claims, and you will have to talk to him about that," and she replied, "Yes, but he did it while he was out for you and Turner." She said Wells located the claims while he was out for us. I remained until the last of September.

I next saw Wells about the 10th or 11th of February, 1912. I went to see him at Turner's request, and met him at Lone Pine, California, and had a conversation with him in relation to the manner in which he had carried out his grubstake contract with us. I identify the instrument shown me. (Plain-

(Testimony of J. F. Creel.)

tiff's Ex.) It was written by me and signed by A. W. Wells in my presence.

Cross-examination.

When Wells started out we paid about four hundred ninety dollars. We expended about five hundred fifty or five hundred sixty dollars when Wells left Rhyolite. We heard from Wells while on the way. After his arrival at Keeler we sent him money at times when he would write for it. I sent him some before June 30, and he asked for money in nearly every letter, and received it every time he asked. We sent money by postoffice order, express order and registered mail. Sometimes I took it to him. I was working in wholesale liquor concern in Rhyolite. I had been with them two or three weeks when Wells left. I had been bookkeeper for Clark Brothers. I had lived in Rhyolite since September, 1906. Was married. I had resources outside of my salary. I cannot fix the exact day of my arrival in Keeler. Mr. Wells was there, and Mrs. Miles. [61] I was not working when I made my first trip to Keeler. I went over the hill and looked at the properties—Ironsides, Beveridge Belle and Iron Max. Wells said the claims belonged to Kate. I went back again the 15th day of June, 1908.

Redirect Examination.

When I was in Keeler in September, 1907, I gave Wells some money and he paid grocery bill at Boland Estate store. He said it could be credited on either his account or that of Burgess. Wells told

(Testimony of J. F. Creel.)

me that it was all the same that both accounts were the same. At this time Burgess asked Wells if he was going to work for Kate or for Turner and Creel. Wells said he was going to work for Turner and Creel, that they had sent us over there and were sending them money. They went away and shortly returned. The conversation was renewed and Burgess agreed it would not be right to turn Turner and myself down at this time, because we had sent them there and were furnishing them with money. This conversation was at Keeler, the latter part of September, 1907.

(It was stipulated by the parties that A. W. Wells died September, 1914.)

(The instrument dated February 11, 1912, marked exhibit "L" was here offered in evidence *for all purposes*, having been identified by witness Creel, and objected to by counsel for defendant, Kate J. Wells, as follows:

"The first objection is that the document purports to be a statement of A. W. Wells, made out of the presence of his wife, and, as a statement of the husband, may not be used in evidence as against his wife without her consent; second, that, as a declaration of a conspirator, no conspiracy has been shown; and third, that, assuming that a conspiracy has been shown, it is a declaration made long after the object of the supposed conspiracy had been reached and is merely a statement of narrative [62] or history of a past event, which is not admissible in evidence against even a co-conspirator. The objec-

(Testimony of Kate J. Wells.)

tion was sustained by the Court upon the third or last ground of the objection and the written instrument excluded as evidence, to which ruling of the Court plaintiff, by counsel, excepted, which exception was by the Court allowed.)

Testimony of Kate J. Wells, for Defendants.

KATE J. WELLS, a witness sworn on behalf of defendants, testified as follows:

My name is Kate J. Wells. I am one of the defendants in this action. I was the wife of A. W. Wells. We were married April 20, 1900, in San Francisco. I was the mother of Burgess Robinson. Burgess Robinson died February 1st, 1908.

I know the region in which the mining claims, which are the subject of this controversy, are located. We owned property in there in 1890. I was in there in 1890. My son Burgess and I were in there in 1900 and 1901. We located the Columbia claim at that time. I was there in April, 1906, with my son Burgess. We located four claims. One or two other persons were there. Mr. A. W. Wells was not there; he was in Los Angeles.

I am familiar with the ground known as the Ironsides claim and the Iron Max and Beveredge Belle and surrounding claims mentioned in the complaint. I first observed the ground now known as the Ironsides claim in 1902. I observed it in 1906. My son was with me at that time. Nothing was done in regard to the Ironsides claim at that time, only to select the name. We intended to locate the Ironsides claim in 1906, but when we returned to Keeler for

(Testimony of Kate J. Wells.)

some supplies we heard of the earthquake in San Francisco—heard that Los Angeles was destroyed and we came here hurriedly. My mother and two sisters and brother [63] were here at the time. That is why we didn't locate the Ironsides at that time. We had the name selected—the Ironsides mine.

After our return to Los Angeles Burgess went to Chloride Cliff to work for Mr. Mitchell. He went to Nevada about September 30, 1906, I think. My son and I had an agreement before we went up in 1906. I did not know Mr. Creel or Mr. Turner in 1906. I wrote to Burgess in regard to going to this district (where the claims involved are situated)—that I wanted to send up an outfit to do the work on the Mahogany Grove. I do not know when he went; I think in the latter part of March or it might have been in April, 1907. During the period of May, June and July of 1907, I furnished supplies to my son Burgess, aggregating something like \$340—an outfit of tents, stoves, drills, hammers, picks and everything of that description pertaining to a mining outfit; from Craig & Company, \$73.22—something like that; Union Hardware Company, \$40.; Fairbanks, Morse & Company, \$50; another bill from Craig, \$5; Union Hardware Company, \$11.75; and in April I sent him \$10 and \$3 for recording our claims. I sent him some money to pay a bill of \$16 for groceries he had got as soon as he got into Keeler; and a number of other items here; \$25 cash later on. Burgess secured supplies for himself

(Testimony of Kate J. Wells.)

while he was up there from Keeler and I paid his bills. The supplies were obtained from the Tom Boland estate. I paid a bill of the Tom Boland Estate of \$60 in October for supplies that had been obtained by Burgess; also bills of \$2.80 and \$6.50 to Dyas.

Q. I hand you a paper in the form of a receipt and ask you if that is the receipt which you received for the money which you paid to the Boland Estate (handing paper).

A. Yes, sir. This is October 4.

Q. What kind of business was Boland doing in Keeler? [64] A. General merchandise.

Q. I hand you a slip purporting to be a receipt for \$16 on June 8, 1907, from the Boland Estate.

A. Yes, sir.

Q. Did you pay that money?

A. Yes, sir, I paid it.

Q. What was that for?

A. Groceries. The groceries that I sent to him from Craig & Co. were delayed at Keeler; they were delayed there, and he went to the Boland store and received these things to live on until his things came from Craig & Company.

Q. I hand you four stubs of Wells, Fargo & Company money orders, apparently, and ask you what those represent. (handing papers).

A. That is one for \$14 to B. T. Robinson, it was a bill that was paid.

Q. To whom was the money sent?

A. B. T. Robinson, my son.

(Testimony of Kate J. Wells.)

Q. Sent directly to him?

A. Yes, sir. And here of \$10 to the Boland Estate October 3, and another one for \$50 to the Boland Estate, being a total of \$60.

Q. Is that the same money represented by this receipt for \$60?

A. Yes, sir. I don't see this date (referring to one of the bills); I think that was in 1908, that \$50 to Mr. Wells.

Q. Very well. We will not offer that. That was later.

A. On July 3 I sent Burgess \$15 and also \$20 in 1907.

Q. I hand you a document purporting to be a check on the State Bank & Trust Company, bearing date July 29, 1907, in favor of R. L. Craig & Co. Does that represent some of the money which you have testified as having been paid to R. L. Craig & Company?

A. Yes, sir. This is another bill of \$33 that I took up with me when I went in July. Yes, I paid for this myself. And [65] here is this \$300 one (handing paper to counsel).

Q. I find another check here drawn in June. I will ask you to look at that and see whether that was for supplies for your son (handing paper).

A. Yes, sir. Yes, that was for some of the things, I think, canteens or something of that kind.

Q. That is the Canfield Hardware Company, \$2.25? A. Yes, sir.

Q. I will ask you to look at this bill, or this check,

(Testimony of Kate J. Wells.)

and ask you to state whether or not that was for supplies for your son.

A. Fairbanks, Morse & Company, yes, for hardware and so forth, \$50.75, that I bought to send to the camp.

Q. And it was sent up to that camp?

A. Yes, sir; it was sent to Burgess Robinson.

Q. And I show you another which was on April 15, 1907, which antedates these locations somewhat.

A. This is for a tent and canteens and mail-bag, or something like that; I sent them to Burgess.

Q. That is, you were sending them up to Inyo County, to Burgess?

A. I was sending them to Inyo County to be used at the camp.

Q. And here is another, R. L. Craig, which was paid in October of that year (handing paper).

A. Yes, sir.

Q. Was that for supplies?

A. No, this is 4/11, \$73.25. That was for provisions that I sent up to my son.

Mr. CARPENTER.—That Dyas-Cline check was \$11.75. I will offer this in a few minutes, unless counsel desires that they should be offered separately.

Q. Now, here is one bearing date the 12th of April, in favor of the Union Hardware & Metal Company (handing paper). [66] A. Yes, sir.

Q. Was that for supplies?

A. That was for supplies also.

Q. At the time that you purchased these supplies

(Testimony of Kate J. Wells.)

in April, 1907, did you then know your son's purpose to go to the camp or to go to this country?

A. I wrote my son in Nevada to go, that I was getting the outfit to send to do the assessment work on the claims previously located, and also to locate the Ironsides.

Q. And you were getting supplies to forward to him for his use when he reached there?

A. For his use, yes.

Q. Here is a check for \$40.50 to the Union Hardware & Metal Co. drawn in April, 1907 (handing paper).

A. Yes; I have an itemized account some place that I could tell what this is for; but this is my check, and I gave it to the Union Hardware Company for supplies.

Q. Sent up to Inyo?

A. Sent up to Inyo County.

Q. Here is a small check to R. L. Craig & Company dated April 15, 1907. Was that for the same purpose?

A. Yes, that was the \$5 I mentioned a while ago.

Q. I hand you a paper purporting to be a receipt dated May 24, to merchandise, bill to B. T. Robinson from the Boland Estate (handing paper). Do you know who furnished the money to pay that bill?

A. I did.

Q. Approximately how much money did you furnish Burgess or how much in money did you furnish—how much did it amount to—the supplies and money you furnished to Burgess during the spring

(Testimony of Kate J. Wells.)

and summer of 1907?

A. I think it amounted to \$500 or \$600, and perhaps more than that. I think it was between \$500 and \$600. At that time the [67] freights were very high—3¢ a pound—and I had to pay all those extra freight bills.

Mr. CARPENTER.—Do you want me to offer all of these separately, or shall I offer them in a group?

Mr. ESTEB.—It doesn't make any difference to me.

The COURT.—Oh, offer them all at once.

Mr. CARPENTER.—I will, then, offer these documents which the witness has identified in evidence.

The COURT.—Let them be marked Defendants' Exhibit 1.

Differences arose between me and my husband A. W. Wells in the fall of 1906. Mr. Wells struck me. We remained unfriendly until sometime in the latter part of August, 1907. I didn't see Mr. Wells during all of that time. I saw Mr. Wells when I went up to the district in 1907. After my return to the camp, perhaps in August, 1907, our relations were renewed.

I heard the testimony of Mrs. Della Miles to the effect that she had a conversation with me in the spring of 1907 in which I stated to her, at her house, that some parties in Rhyolite had furnished an outfit for Mr. Wells and Burgess to go up to the camp and that I had instructed them to locate everything up there. I did not make that statement to Mrs. Miles. I was at the funeral of Mrs. Miles' son on

(Testimony of Kate J. Wells.)

February 22, 1907. I again saw her in June. I do not remember having seen her at any time between the 22d of February and June. Our relations were not friendly. I went to the funeral of her son because he was a schoolmate of my son (Burgess), also of my boy that married her daughter. I saw Mrs. Miles in June, 1907, at the depot, I think, when the children arrived from the Philippines. By "the children" I mean my son Harold and her daughter Mae. They were married at that time and had just returned from the Philippines. Nothing was said at that time regarding the mining claims in Inyo [68] County. I have talked about mines and things like that in general with my son and Mrs. Miles. My son married a daughter of Mrs. Miles but they are now divorced.

I heard Mr. Turner's testimony with respect to our meeting in the Hollenbeck Hotel in January, 1913. This suit had been begun the December before. My object in seeing Mr. Turner was to find out about a pair of gold-scales that were over at Inyo County that I wished to purchase for the mine—that Mr. Wells had brought over, and I wanted to find out from Mr. Turner if they belonged to him and he said they were not his property. I did not say to Mr. Turner in Hollenbeck Hotel in January, 1913, "If you get all that belongs to you on the hill you will have nearly all of it." I told Mr. Turner if he ever had anything on the hill he would pay hard cash for it. That is what I told him. I did not say to Mr. Turner during the conversation in the

(Testimony of Kate J. Wells.)

Hollenbeck Hotel in January, 1913, that I would rather have him for a partner than Mr. Wells. We spoke something of Mr. Wells' differences and he said to me, "I would be kinder to you than that if I were your partner."

I heard Mr. Creel's statement that on the Don Creel claim in June, 1908, he, Wells and I engaged in a conversation regarding the overlapping of the Beveridge Belle by the Don Creel. I had no conversation on the Don Creel regarding the overlapping of the Beveridge Belle by the Don Creel. I did have a conversation on that subject with Mr. Creel at the house. Mr. Wells was present. Mr. Wells said some very unkind things at the time.

I never at any time had any conversation or communication with A. W. Wells with regard to his locating claims in my name in the Beveridge Mining District during the spring and summer of 1907. I never at any time asked Mr. Wells to locate any claims for me while he was in the Beveridge district in the [69] spring and summer of 1907. I was not on friendly terms with Mr. Wells and would not ask him.

Upon cross-examination the defendant Kate J. Wells further testified, as follows:

We mined on the Columbia in 1890. I was all over the hills where the claims, which are the subject of this suit, are located, in 1890. We were in there also in 1901 and 1902. I stated in my direct examination that nothing was done on these claims in 1906 when my son and I were there. My son

(Testimony of Kate J. Wells.)

Burgess and I were up there in 1906; we went there about the 12th of April, 1906, and remained there about twelve days, to my recollection. We returned on the day of the earthquake in San Francisco; I do not remember what day it was; we arrived at Los Angeles about a day or so after the earthquake. My son Burgess remained with me in Los Angeles after that until September, 1906. He went to Beatty but was too late to take the position of stenographer at the hotel. He went to work for Mr. Mitchell. I do not remember exactly the day Burgess went to Chloride Cliff; I presume it was in October or November. Burgess left Los Angeles on September 30, 1906, to go to Nevada. He remained at Chloride Cliff until some time in February or March, I think. He wrote me that he was going to Inyo County. I stated in my direct examination that I wrote to him to go to Inyo County. I had my outfit and was getting it ready and had the money to get it. That outfit is what I paid for with these checks. It was sent to Keeler. I think Burgess arrived on the property in April, 1907, about the 15th or 16th, judging from the bills. I had letters from him after I wrote him at Chloride Cliff to come to Inyo County before he came. I think I received one from him from Keeler or from Skidoo. Burgess wrote me that Mr. Wells had told him to go to Inyo County with him. I wrote back and told him to have nothing to do with Mr. Wells and not to go [70] with him and warned him not to have anything to do with the man. I don't remem-

(Testimony of Kate J. Wells.)

ber how often I heard from Burgess. I know when Burgess arrived at what is known as Camp Burgess after leaving Rhyolite. I received a letter from him from Keeler. I received one, I think, from Bullfrog, or some place in there. The letter from Keeler was received about the 15th or 16th of April, 1907, telling me that the outfit had not arrived and for me to let him get some things at Tom Boland's store as they had arrived there without provisions. If I said that they did not get to Keeler until some time in the latter part of May or June, I was mistaken. I should judge from the bill that Burgess got from Boland that he arrived there something about the 15th, 16th or 17th. I think the bill is marked the 17th. Burgess was to do the work on the Columbia, Panther, Bromide King and Ben Hur; also to locate the Ironsides. He did the assessment work on Panther, Ben Hur and other claims. I do not know who was working with him on those claims. I do not know that A. W. Wells was working on those claims with him at that time. Mr. Smith was not working there at that time. I hired him in 1908. As to the business I was engaged in here, I made several loans for a firm here and I sold some real estate. I had a class on the piano. I was not working mines at that time from which I was extracting ore.

During the assessment work on the group spoken of (Panther, etc.) Burgess was not taking out ore for the market.

The Ironsides was located in April, 1907, but he

(Testimony of Kate J. Wells.)

did not record it at that time. I think it was on the 27th day of April. He afterwards located it and recorded it. The Catch-em-Mac was located in July 28, 1907, just previous to my going up there.

Q. (By Mr. ESTEB.) Now, these bills and checks which you have identified and which were presented in evidence, are any of those duplicates, or do these bills represent separate accounts, or [71] are some of these checks in payment for these bills?

A. Not for this (indicating).

Q. Are there any other bills in there that you—

A. No, I don't think so.

Q. Was this bill paid by any of these checks in here? A. Not by the checks.

Q. Was it by any of these drafts that are in here, the Wells, Fargo checks?

A. This \$60 was paid to the Tom Boland Estate on Octobed 4 for a bill that was got there by Burgess.

Q. Is that in one of the bills that are in here?

A. No. This is a check here. And that is a receipt, yes. There is a receipt here, yes. There is one receipt here for \$60 from the Tom Boland Estate on October 3.

Q. And that is the check that paid that?

A. Yes, sir, that is the check that paid it.

Q. Were all of those bills, as you recollect them, contracted and the payments made in the year 1907?

A. Yes, sir.

Q. And I understood you to state to Judge Carpenter that was between the 11th day of April and the 4th day of October, 1907? A. Yes.

(Testimony of Kate J. Wells.)

There was no such an outfit over at Camp Burgess as was described by Mr. Creel and Mr. Turner. There was a team of mules, one bay and one brown. No one was using them at the time I was in there. Mr. Wells was cleaning them up all the time. The supplies that were sent to Burgess Robinson in May, June and July, 1907, were sent to him by pack-trains or burros. It is not a fact that nearly everything I sent up there was taken up by the mules. It was impossible for a wagon to get up there. [72]

Upon redirect examination the witness KATE J. WELLS testified as follows:

I borrowed money from my sister Mrs. Gridley to carry on this mining work in Inyo County in 1907. In 1906, I borrowed \$250 and in 1907 I borrowed \$300 from her. That was to spend in connection with Burgess' operations in Inyo County. The check which is now shown me represents the money borrowed from my sister. (Check offered in evidence and admitted without objection.)

Upon recross-examination the witness KATE J. WELLS testified as follows:

I do not remember the date of this check; I think it was some time in April, the first week in April. I borrowed the money from my sister. I borrowed in 1906 \$250 in April when I went to the mines; and I borrowed from her \$300 in April, 1907. The \$300 I repaid to my sister in 1908. The \$250 was paid at the same time. It was not all paid to her on April 4, 1907; it was paid to her in 1908.

Defendants' Exhibit 1 consists of the following papers:

(Note: Not enumerated.)

When the Court rendered its decision, it stated, that after taking the case under consideration, the Court, in considering the case, had concluded to admit in evidence the written statement of T. F. Turner by A. W. Wells, dated February 11, 1912, for all purposes and for what it is worth, but that he did not consider the same sufficient proof to establish the conspiracy between the defendant, Kate J. Wells, and A. W. Wells and Burgess T. Robinson, or sufficient proof to establish and prove the [73] agreement between the defendant, Kate J. Wells, and A. W. Wells and Burgess T. Robinson to defraud Turner and Creel.

Respectfully submitted,

W. B. OGDEN,

RALPH E. ESTEB,

Solicitors for Complainant.

Service of a copy of the above statement of witnesses examined on the trial of the above cause, in Equity, is hereby acknowledged and the same is hereby approved this 22d day of December, 1915.

S. E. VERMILYEA,

S. L. CARPENTER,

Solicitors for Defendants, Kate J. Wells and Ironsides etc. Co.

Approved this 22 day of December, 1915.

BENJAMIN F. BLEDSOE,

U. S. District Judge for Southern District of California.

[Endorsed]: Original. No. 45-Civil. In Eq. In the District Court of U. S., Southern District of Calif., Southern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells et al., Defendants. Condensed Statement of Witnesses' Testimony in Narrative Form. Ralph E. Esteb and William B. Ogden, Main 4505, F-1813, 711 American Bank Building, Second and Spring Streets, Los Angeles, Cal., Attorneys for Plaintiff. Filed Dec. 22, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [74]

*In the District Court of the United States, in and for
the Southern District of California, Northern
Division.*

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS, IRONSIDES MINING RE-
DUCTION AND LEASING COMPANY, a
Corporation, MRS. E. R. SHOCKMAN,
GEORGE L. ARNOLD and C. J. HECK-
MAN,

Defendants.

Opinion and Order Denying Rehearing.

Petition for a rehearing herein has been filed on the score of newly discovered evidence.

If all the matters alleged in the petition were proved, the result reached in the trial of the cause would not be affected, in my judgment. Many of the matters as to *the name of the party* to whom certain

merchandise was sold is immaterial to any substantial issue in the case.

If Burgess Robinson, who was not acting under or in pursuance of any grubstake agreement with the plaintiff and his copartner, located the Ironsides Group of mines in the name of himself and mother, then the fact that he was in the company of a man (Wells), who was under such grubstake agreement, would not give Wells or his grubstakers any interest in the property so located.

The entire question in the case turned on the answer as to who actually located the Ironsides Group. The Court at the [75] trial answered this by holding that Robinson located that group and that in consequence Well's grubstakers had no interest in the properties. The "newly discovered" evidence does not disprove or militate against this conclusion *in any way*. On the contrary Well's letter to Wilson states explicitly that Wells "paid for his (Robinson's) share of the provision *out of my own money*. *He located some very valuable claims* as I will tell later on; the first claim *he located*, he put his name and mine as locators; then I thought *their* might be complication with the parties who grubstaked me, and told him to put my wife's name on the location in place of mine, and the balance of the claims were located in his name and the name of Mrs. A. W. Wells, so my name does not appear on any of the recorded notices."

This letter was written in an effort on Wells' part to assert and secure some interest *on his own part* in and to the claims in question; no where in the

letter, however, is there the slightest suggestion that the claims *were actually located by him*, or that the plaintiff and his copartner were to participate in the locations.

Such being the case, nothing being shown which would cause the Court to change its decision in the premises, there is no necessity for a rehearing and the application for the same is denied.

BLEDSON,
District Judge.

June 30, 1915.

[Endorsed]: No. 45-Civ. N. D. U. S. District Court, Southern District of California, Northern Division. T. F. Turner, vs. Kate J. Wells et al. Opinion and Order Denying Rehearing. Filed Jun. 30, 1915. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. [76]

*In the District Court of the United States, Southern
District of California, Northern Division.*

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS, IRONSIDES MINING REDUCTION AND LEASING COMPANY, a Corporation, MRS. E. R. SHOCKMAN, GEORGE E. ARNOLD and C. J. HECKMAN.

Petition for Allowance of Appeal.

The above-named complainant, T. F. Turner, conceiving himself aggrieved by the decree made and

entered by the said court in the above-entitled cause on March 6, 1915, in dismissing the said Second Amended Bill of Complaint of said plaintiff out of this court and for costs, does hereby appeal from said decision to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Error filed herewith, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which complainant shall give and furnish upon such appeal; and that a citation issue, as provided by law, and prays that this appeal may be allowed, and that the transcript of record, papers and proceedings upon which said decree was made, duly authenticated, in accordance with the rules of Equity promulgated by the Supreme [77] Court of the United States and the statutes made and provided, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WM. B. OGDEN,
RALPH E. ESTEB,
Solicitors for Complainant.

[Endorsed]: Original. No. 45-Civil. In Equity. In the District Court of the United States, Southern District of Cal., Northern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells et al., Defendants. Petition for Allowance of Appeal. Received copy of the within Petition this — day of June, 1915. ——— Attorney for Defendants. Ralph E. Esteb and William B. Ogden, Main 4505, F-1813, 711 American Bank Building, Second and Spring

Streets, Los Angeles, Cal., Solicitors for Plaintiff.
Filed Dec. 22, 1915. Wm. M. Van Dyke, Clerk. By
R. S. Zimmerman, Deputy Clerk. [78]

*In the District Court of the United States, Southern
District of California, Northern Division.*

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS, IRONSIDES MINING RE-
DUCTION AND LEASING COMPANY, a
Corporation, MRS. E. R. SHOCKMAN,
GEORGE L. ARNOLD and C. J. HECK-
MAN,

Defendants.

Assignments of Error.

Comes now the complainant in the above-entitled cause, by William B. Ogden and Ralph E. Esteb, his solicitors, and assigns the following errors, upon which they will reply upon their appeal from the decree heretofore made and entered by this Honorable Court on the 6th day of March, 1915, in the above-entitled cause, to wit:

I.

That the Court erred in holding that the oral testimony of plaintiff in connection with the written statement of A. W. Wells dated the 11th day of February, 1912, was insufficient to establish the conspiracy between A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells, as alleged in plaintiff's Second Amended Bill of Complaint. [79]

II.

That the Court erred in holding that the oral testimony of plaintiff in connection with the written statement of A. W. Wells dated the 11th day of February, 1912, was insufficient to establish the fraudulent transaction between A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells, as alleged in plaintiff's Second Amended Bill of Complaint.

III.

That the Court erred in holding that the written statement of A. W. Wells dated the 11th day of February, 1912, by which it was sought to establish a conspiracy with Burgess T. Robinson and the defendant, Kate J. Wells, was not sufficient proof to establish the conspiracy between said A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells, as alleged in plaintiff's Second Amended Bill of Complaint.

IV.

That the Court erred in holding that the written statement of A. W. Wells dated the 11th day of February, 1912, by which it was sought to establish the fraudulent transaction between A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells, was insufficient proof to establish the agreement between A. W. Wells, Burgess T. Robinson and Kate J. Wells to defraud Turner and Creel in carrying out their grubstake contract.

V.

That the Court erred in striking out the testimony of Mrs. Della Miles, as to the statements made to her

by Burgess T. Robinson, "That he was going to get out of there; that Wells and his mother were raising so much fuss that Creel and Turner would come in and take the whole thing anyhow as soon as they heard of it," by which it was sought to show a statement adverse to the interest of Burgess T. Robinson, whose interest [80] in this property, later on, upon his death, became the property of his mother, Kate J. Wells, one of the defendants herein.

VI.

That the Court erred in rendering its decree dismissing plaintiff's Second Amended Bill of Complaint, for the reason that said decree is against the weight of the evidence and contrary to the law under the evidence.

In order that the foregoing Assignments of Error may be made of record, the defendants present the same to the Court and petition that disposition may be made thereof in accordance with the laws of the United States thereunto provided.

WHEREFORE, the said complainant prays that the said decree and order of this Court made and entered on the 6th day of March, 1915, dismissing complainant's Second Amended Bill of Complaint, be reversed in part and in whole, and that the United States District Court for the Southern District of California, Southern Division, be directed to enter an order setting aside in entirety the order and decree of March 6, 1915.

Respectfully submitted,
W. B. OGDEN,
RALPH E. ESTEB,
Solicitors for Complainant.

[Endorsed]: Original. No. 45—Civil. In Eq. In the District Court of United States, Southern District of California, Northern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells, et al., Defendants. Assignments of Error. Ralph E. Esteb and William B. Ogden, Main 4505, F-1813, 711 American Bank Building, Second and Spring Streets, Los Angeles, Cal., Solicitors for Plaintiff. Filed Dec. 22, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [81]

*In the District Court of the United States, Southern
District of California, Northern Division.*

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS, IRONSIDES MINING REDUC-
TION AND LEASING COMPANY, a Corpo-
ration, MRS. E. R. SHOCKMAN, GEORGE
L. ARNOLD and C. J. HECKMAN,

Defendants.

Order Allowing Appeal.

In the above-entitled cause, the complainant, through the solicitors, William B. Ogden and Ralph E. Esteb, having filed his petition for an order allowing an appeal from the decree of this court made and entered March 6th, 1915, and it appearing to the Court that said complainant has filed Assignments of Error:

IT IS HEREBY ORDERED, that an appeal to the United States Circuit Court of Appeals for the

the United States Circuit Court of Appeals for the Ninth Circuit, from the decree in said cause made and entered on the 6th day of March, 1915, be and the same is hereby allowed; and that the bond for costs be and the same is hereby fixed at the sum of two hundred and fifty dollars. [82]

IT IS FURTHER ORDERED, that upon the filing of such security a certified transcript of the records and proceedings herein be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with the rules of Equity by the Supreme Court of the United States promulgated, and in accordance with the statutes made and provided.

Dated December 22, 1915.

BLED SOE,
District Judge.

[Endorsed]: Original. No. 45—Civil. In Eq. In the District Court of U. S. for the Southern District of Calif, Northern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells et al., Defendants. Order Allowing Appeal. Received copy of the within order this — day of June, 1915. —, Attorney for Defendants. Ralph E. Esteb and William B. Ogden, Main 4505, F-1813, 711 American Bank Building, Second and Spring Streets, Los Angeles, Cal., Solicitors for Plaintiff. Filed Dec. 22, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [83]

*In the District Court of the United States, Southern
District of California, Northern Division.*

No. 45—CIVIL. IN EQUITY.

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS, IRONSIDES MINING REDUC-
TION AND LEASING COMPANY, a Corpo-
ration, MRS. E. R. SHOCKMAN, GEORGE
E. ARNOLD and C. J. HECKMAN,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, T. F. Turner, as Principal, and J. W. Wal-
lace, Jr., J. W. Brunton and George L. Smith, as
Sureties, are held and firmly bound unto Kate J.
Wells, Ironsides Mining Reduction and Leasing
Company, a corporation, Mrs. E. R. Shockman,
George L. Arnold and C. J. Heckman, defendants in
the above-entitled action, in the penal sum of two
hundred and fifty dollars, to be paid to said Kate J.
Wells, Ironsides Mining Reduction and Leasing
Company, a corporation, Mrs. E. R. Shockman,
George L. Arnold and C. J. Heckman, their heirs and
assigns, for the payment of which sum well and truly
to be made we bind ourselves, our heirs, executors
and administrators firmly by these presents.

The condition of the above obligation is such that,
whereas, the said complainant, T. F. Turner, of the

above-entitled action is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse a decree made, [84] rendered and entered on the 6th day of March, 1915, by the District Court of the United States for the Southern District of California, Northern Division, in the above-entitled cause, in which the Bill of Complaint of the said complainant, T. F. Turner, was dismissed:

NOW, THEREFORE, the condition of the above obligation is such that if said T. F. Turner shall prosecute his said appeal to effect and answer all costs, if he fails to make his plea good, then this obligation shall be void; otherwise, to remain in full force and effect.

IN WITNESS WHEREOF, the seals and signatures of said principal and said sureties are hereto affixed at Los Angeles, California, this 22d day of December, 1915.

T. FRANK TURNER. (Seal)

J. W. WALLACE, Jr. (Seal)

GEORGE L. SMITH. (Seal)

JOHN W. BRUNTON. (Seal)

Approved this 22d day of December, 1915.

BLEDSON,
District Judge.

United States of America,
Southern District of Cal.,
County of Los Angeles,—ss.

J. W. Wallace, Junior, J. W. Brunton and George L. Smith, the sureties named in the above and foregoing bond, being duly sworn, each for himself says,

that he is a freeholder and resident within said State, and is worth the sum of [85] two hundred and fifty dollars, over and above all his debts and liabilities, exclusive of property exempt from execution.

J. W. WALLACE, Jr.

GEORGE L. SMITH.

JOHN W. BRUNTON.

Subscribed and sworn to before me this 22d day of December, 1915.

[Seal]

MARY E. MORRIS,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. No. 45—Civil. In Eq. In the District Court of U. S., Southern District of Cal., Southern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells et al., Defendants. Bond on Appeal. Ralph E. Esteb and William B. Ogden, Main 4505, F-1813, 711 American Bank Building, Second and Spring Streets, Los Angeles, Cal., Attorney for Plaintiff. Filed Dec. 23, 1915. Wm. M. Van Dyke. By R. S. Zimmerman, Deputy Clerk. [86]

ORIGINAL.

*In the District Court of the United States, Southern
District of California, Southern Division.*

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS,

Defendant.

Praecipe for Preparation of Transcript.
PRAECIPE UNDER EQUITY RULE 75.

To the Clerk of the Court:

You will please incorporate into the transcript on appeal from this court to the Circuit Court of Appeal, an order approving appeal on behalf of plaintiff made and entered on the 22d day of December, 1915, the following portions of the record of this cause in equity, to wit:

A certified copy of the condensed statement of the testimony of witnesses in narrative form, as approved by the Court on the 22d day of December, 1915;

Second Amended Bill of Complaint herein;

The Assignments of Error filed herein;

Names and Addresses of the solicitors and counsel for the parties herein;

The Citations on Appeal herein;

The Petition for Order Allowing Appeal herein;

The Order Allowing Appeal herein;

The Defendants' Exhibits #1 or duly certified copy thereof, as filed herein; [87]

Written opinion denying petition for rehearing dated June 30, 1915.

Decree of court herein.

Very respectfully,

WM. B. OGDEN,

RALPH E. ESTEB,

Solicitors and Counsel for Plaintiff-Appellant.

Due service and receipt of a copy of the within Citation is hereby admitted this 23 day of December, 1915.

S. E. VERMILYEA,
S. L. CARPENTER,

Counsel and Solicitation for Defendants.

[Endorsed]: Original. No. 45—Civil. In Equity. In the District Court of U. S., Southern District of Calif., Southern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells et al., Defendants. Praecipe Under Equity Rule 75. Ralph E. Esteb and William B. Ogden, Main 4505, F-1813, 711 American Bank Building, Second and Spring Streets, Los Angeles, Cal., Attorneys for Plaintiff. Filed Dec. 23, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [88]

*In the District Court of the United States, in and for
the Southern District of California, Northern
Division.*

No. 45—CIV.—IN EQUITY.

T. F. TURNER,

Complainant,

vs.

KATE J. WELLS et al.,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing eighty-eight (88) typewritten pages, numbered from 1 to 88, inclusive, to be a full, true and correct copy of the Second Amended Bill of

Complaint, Answer to Second Amended Bill of Complaint, Minute Order of Court of date, March 10th, 1913, Minute Order of Court of date, February 23d, 1915, Final Decree, Order Denying Petition for Rehearing, Defendants' Exhibit One, Condensed Statement of Testimony in Narrative Form, Petition for Allowance of Appeal, Assignments of Error, Order Allowing Appeal, Bond on Appeal, and Praecipe for Preparation of Transcript, in the above and therein entitled cause, and that the same together constitute the Transcript upon Appeal of T. F. Turner herein, in accordance with the Praecipe for Preparation of Transcript filed in my office on behalf of the appellant by his solicitors of record. [89]

I do further certify that the cost of the foregoing Transcript upon Appeal is \$48.60, the amount whereof has been paid me by T. F. Turner, the appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Northern Division, this 27th day of May, in the year of our Lord, one thousand nine hundred and fifteen, and of our Independence the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
5/27/16. L. S. C.] [90]

[Endorsed]: No. 2798. United States Circuit Court of Appeals for the Ninth Circuit. T. F. Turner, Appellant, vs. Kate J. Wells, Ironsides Mining Reduction and Leasing Company, a Corporation, Mrs. E. R. Shockman, George E. Arnold and C. J. Heckman, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed May 31, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the District Court of the United States, Southern
District of California, Southern Division.*

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS et al.,

Defendants.

Order Extending Time to March 31st, 1916.

Good cause appearing therefor,

IT IS HEREBY ORDERED, that the time heretofore allowed said appellant to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby enlarged

and extended to and including the 31st day of March, 1916.

Dated Los Angeles, California, Jan. 12, 1916.

BLEDSOE,

U. S. District Judge, Southern District of California,
Southern Division.

[Endorsed]: Original. No. 45—Civil. In Eq. In the District Court of U. S., Southern District of Calif., Northern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells et al., Defendants. Order Extending Time to March 31st, 1916.

No. 2798. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to March 31, 1916, to File Record Thereof and to Docket Case. Filed Jan. 15, 1916. F. D. Monckton, Clerk. Refiled May 31, 1916. F. D. Monckton, Clerk.

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 45—CIVIL. IN EQUITY.

T. F. TURNER,

Plaintiff,

vs.

KATE J. WELLS et al.,

Defendants.

Order Extending Time to May 31st, 1916.

Good cause appearing therefor,

IT IS HEREBY ORDERED, that the time heretofore allowed said appellant to docket said cause

and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 31st day of May, 1916.

Dated at Los Angeles, California, March 27, 1916.

BLEDSON,

U. S. District Judge, Southern District of California,
Southern Division.

[Endorsed]: Original. No. 45-Civil. In Eq. In the District Court of U. S., Southern District of California, Southern Division. T. F. Turner, Plaintiff, vs. Kate J. Wells et al., Defendants. Order Extending Time to May 31st, 1916.

No. 2798. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to May 31, 1916, to File Record Thereof and to Docket Case. Filed Apr. 3, 1916. F. D. Monckton, Clerk. Refiled May 31, 1916. F. D. Monckton, Clerk.

No. 2798.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

T. F. Turner.

Appellant.

vs.

Kate J. Wells and Ironsides Re-
duction and Leasing Company,
a corporation,

Appellees.

BRIEF OF APPELLANT.

Upon Appeal from the United States District Court
for the Southern District of California, Southern
Division.

WM. B. OGDEN,

RALPH E. ESTEB,

711-715 American Bank Bldg

Los Angeles, California,

Solicitors for Complainant.

Filed

SEP 22 1916

F. D. Monckton

Clerk

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

T. F. Turner.

Appellant.

vs.

**Kate J. Wells and Ironsides Re-
duction and Leasing Company,
a corporation,**

Appellees.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an action on a grub-stake contract to recover from Kate J. Wells and her privies in interest a two-thirds interest in the claims described in the petition on account of the fraudulent conspiracy between she and her husband, A. W. Wells, to locate these claims in her name and the name of her son, Burgess Robinson, while Wells was working under said grub-stake contract, and while Burgess Robinson was helping Wells on said contract and with full knowledge of the terms of the grub-stake contract.

On or about the 1st day of March, 1907, at Rhyolite, state of Nevada, the plaintiff and J. F. Creel, as outfitters, entered into an agreement with A. W. Wells, as prospector, whereby the outfitters contracted and agreed to furnish the prospector, Wells, with a team, wagon, camp outfit, money and supplies for prospecting for minerals upon the public mineral domain in the United States, and it was agreed that Burgess T. Robinson, his step-son, should accompany Wells, to assist him in the work of prospecting, but that owing to the fact that the said Robinson was not of age, he was not to be allowed to participate in the property discovered, except as to such part as might be agreed upon between he and A. W. Wells, who was permitted to share his one-third interest with the said Robinson. It was further agreed that all mineral deposits discovered by said Wells and Burgess Robinson, while supplied by plaintiff and said Creel with said outfit and supplies, should be located in the names of this plaintiff and said J. F. Creel and A. W. Wells, and that each should be entitled to an undivided one-third ($1/3$) interest in all such discoveries and locations. That in pursuance of said contract the plaintiff and said Creel furnished the said Wells with the outfit, money and supplies agreed upon, and that the said Wells and Robinson left the state of Nevada and journeyed to that portion of Inyo county, California, now known as the Beveridge Mining District; that at some time between, at or about the making of said contract, and the month of August, 1907, or thereabouts, the said A. W. Wells and the said Burgess T.

Robinson entered into a conspiracy with the defendant Kate J. Wells, for the purpose of defrauding and unjustly depriving the plaintiff and J. F. Creel of their interest in discoveries of the mineral made and to be made by the said A. W. Wells, and that in pursuance of such conspiracy and while the said A. W. Wells and said Burgess T. Robinson were acting in pursuance of said contract, and had possession of said outfit, money and supplies of plaintiff and said J. F. Creel, the said A. W. Wells and Burgess T. Robinson made certain valuable discoveries of mineral in said Beveridge Mining District, and in violation of their contract with the plaintiff and said J. F. Creel, located the said discoveries in the name of Kate J. Wells and Burgess T. Robinson.

Testimony was also introduced to establish that said A. W. Wells made discovery of all said mining locations, and that he and Burgess T. Robinson performed all the necessary acts of location, and that the said A. W. Wells dictated or wrote the notices of location, and that the same were filed for record at his request in the office of the county recorder of Inyo county, California. [Transcript, page 55.]

It was also shown that neither the plaintiff nor his assignor was chargeable with any facts or information with which to put him upon his inquiry, as to said fraud, until about the month of December, 1911. Having fully satisfied themselves of the merits of their claim to said property, and the said Creel being without funds with which to prosecute an action for the recovery of their interest in said property, the said

Creel, for a consideration, sold, assigned and conveyed unto this plaintiff all his right, title and interest in the property. On February 11, 1912, A. W. Wells wrote a letter to this plaintiff, addressed to him at Boston, and also to J. F. Creel, in which he stated that a conspiracy had been entered into between Kate J. Wells, Burgess T. Robinson and himself to defraud said Turner and Creel out of the mining claims located by him while working on the grub-stake of said Turner and Creel. [Transcript page 47.] This plaintiff employed counsel, and in the month of December, 1912, instituted this action against said Kate J. Wells and others for the recovery of said mining claims, or his lawful interest therein. In September, 1914, A. W. Wells died. The cause was tried to the court, and on March 13, 1915, the court rendered its decree dismissing plaintiff's second amended bill of complaint, from which decree this appeal is prosecuted.

ASSIGNMENTS OF ERROR.

The decree is erroneous in that instead of dismissing complainant's second amended bill of complaint, it should have decreed the plaintiff, T. F. Turner, the rightful owner of a two-thirds interest in and to the mining claims described in his second amended bill of complaint, as more fully appears in the following assignments of error:

I.

That the court erred in holding that the oral testimony of plaintiff in connection with the written state-

ment of A. W. Wells dated the 11th day of February, 1912, was insufficient to establish the conspiracy between A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells, as alleged in plaintiff's second amended bill of complaint.

II.

That the court erred in holding that the oral testimony of plaintiff in connection with the written statement of A. W. Wells dated the 11th day of February, 1912, was insufficient to establish the fraudulent transaction between A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells, as alleged in plaintiff's second amended bill of complaint.

III.

That the court erred in holding that the written statement of A. W. Wells dated the 11th day of February, 1912, by which it was sought to establish the fraudulent transaction between A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells, was not sufficient proof to establish the conspiracy between said A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells, as alleged in plaintiff's second amended bill of complaint.

IV.

That the court erred in holding that the written statement of A. W. Wells dated the 11th day of February, 1912, by which it was sought to establish the fraudulent transaction between A. W. Wells, Burgess T. Robinson and the defendant, Kate J. Wells,

was insufficient proof to establish the agreement between A. W. Wells, Burgess T. Robinson and Kate J. Wells to defraud Turner and Creel in carrying out their grub-stake contract.

V.

That the court erred in rendering its decree dismissing plaintiff's second amended bill of complaint, for the reason that said decree is against the weight of the evidence and contrary to the law under the evidence.

ARGUMENT.

I.

The four assignments of error upon which appellant relies for a reversal, each covering, as it does, practically the same proposition, but stated in a different way, will all be considered together.

As indicated, the only question raised in this case is whether the letter containing the declarations of A. W. Wells, now deceased, was competent testimony to be received in this cause, to establish the conspiracy, and if competent, and so received, was it sufficient in law to warrant a decree in the lower court vesting in appellant a two-thirds interest in the mining claims described in appellant's second amended bill of complaint?

If that evidence were competent and in law sufficient, when corroborated by circumstances and admissions of parties and privies, then the decree of the lower court should have been in favor of the appellant, and the action of the lower court in dismissing the bill should

be reversed. The letter which was offered in evidence, being plaintiff's Exhibit "L" [Transcript pages 47 to 53], is as follows:

Lone Pine, Calif., Feby. 11th, 1912.

Mr. T. Frank Turner,
Boston, Mass.

Mr. J. F. Creel,
Los Angeles, Cal.

Gentlemen:

Pursuant to your request regarding the grub-stake agreement had between yourselves and myself I herewith attached a complete statement of our relations with each other as relates to that agreement and the carrying out of the same.

That on or about the first day of March, 1907, I came down from Goldfield to the home of J. F. Creel in Rhyolite, and remained there for a period of days with him, being at the time badly troubled with the rheumatism in one of my legs.

That during my stay there with him we talked many times of the possibilities of mining and the chances a person would have in some country in California in which I had had quite a little experience, and that upon the many occasions with Mr. Turner, Mr. Creel and others present, viz., E. Pritchard Smith, Mr. Godfry, Major C. W. Callahan and Ed. Whitney, relative to my going into the field to discover some ground containing mineral in the interest of yourselves and myself.

That it was finally agreed verbally between us and

in the presence of the above named parties and on occasions of others that I would go out for you provided you furnished me with a proper means of travel and that I would prospect and explore the country to the best of my ability and at all times to the interest of the three of us connected with the same, no limit of time being set upon the length of time of the life of the grub-stake or agreement.

That it was finally agreed that you would secure and later did secure a two mule team and light road wagon in which I was to start on the trip, that you also provided equipment and tools, feed and supplies for myself and team.

That then came the question of taking Burgess Robinson along to help me in my work and to carry out my agreement with you, and which was consented to by both of you. I went to Chloride Cliff in Inyo county, Calif., on the Funeral Range of Mountains, and there explained to the said Burgess Robinson in detail regarding the trip and he was agreeable to the same and at once accompanied me to the home of J. F. Creel in Rhylite, Nevada, and it was further agreed in the presence of ourselves and several of the above named witnesses that Burgess Robinson was to accompany me on the trip to help me.

It was also understood and agreed that the terms of the agreement was not altered except that Burgess was not to participate in the same only to the extent of whatever interest I myself might obtain from whatever was discovered or located.

That the fact being known at the time by all con-

cerned that the said Burgess Robinson being my son-in-law by marriage to Kate J. Robinson, and the further fact that he being a minor, under the age of twenty-one years of age, the matter of making an agreement with a minor not seeming possible we would not make him a party to the agreement otherwise than stated.

That during the latter part of March, 1907, after everything was in readiness, we picked up A. I. Warren, then of Lees Camp, Inyo county, Calif., who accompanied us as far as Skidoo, Calif., on agreement to secure an option on a lead and silver property then owned by one John Lamoine, and if possible to proceed to Los Angeles or any other place and to dispose of the same for the benefit of himself and the ones connected with this agreement.

That on or about the 19th day of March, 1907, we took leave of your presence and proceeded forth to prospect and discover and otherwise secure mineral rights by any means possible and legal but always to the interest of the parties connected with the agreement.

That we proceeded across the Death Valley, stopping at Skidoo, Calif., for a short time, where we left A. I. Warren, and Burgess Robinson and myself proceeded through the way of Ballerat, Darwin to Keeler, Calif., and from there into the White Mountains by the way of Swansea, a Station on the N. & C. R. R., and then and there prospected for mineral ground, that we discovered and located several claims near to the Station of Swansea known as the Combination,

Black Metal, Sunset, and the South Extension of the Black Metal, notice of which was made and later recorded in the office of the County Recorder at Independence, California.

That we then proceeded further into the mountains and there discovered numerous claims on the summit of the mountains and in what is known today as the Camp of Burgess.

That we located in the names of J. F. Creel, T. F. Turner and A. W. Wells the claims known and recorded as the Summit, Callahan, Don Creel, T. F. T. and the Extension, said claims being in the Canyon known as the Craig Canyon, through which passes the well known Hunter trail.

That on June 7th, 1907, we located and discovered what is known as the Golden Rule No. 2, as shown in the Mining Records in Book "Z," page 510, in the Office of the Recorder at Independence, Inyo County, Cal.

That on the 8th day of June, 1907, we discovered and located the claim known as the Golden Rule No. 3, as recorded in the Recorder's office at Independence, Inyo County, California, in Book "I," page 274.

That on June 22nd, 1907, we discovered and located the claim known as the Ironsides, and recorded in Book "Z," page 509, in the office of the Recorder at Independence, Inyo County, Calif.

That on June 22nd, 1907, we also discovered and located the claim known as the Catch-em-Mac, as shown of record in Book "L," page 276, in the Recorder's office at Independence, Inyo County, Calif.

That on June 28th, 1907, we discovered and located the claim known as the Iron Max, as shown of record in Book "1," page 277, in the office of the Recorder at Independence, Inyo County, Calif.

That on the 15th day of July, 1907, we discovered and located the claim known as the Grand View, as shown of record in book "1," page 545, in the Recorder's office at Independence, Inyo County, Calif.

That on July 29th we discovered and located the claim known as the Kate J., as shown of record in Book "1," page 546, in the Recorder's office of Independence, Inyo County, Calif.

That on August 1st, 1907, we discovered and located the claims known as "Garnet Fraction," as shown of Record in the Recorder's office at Independence, Inyo County, California, in Book "1," page 545.

That on August 17th we discovered and located the claim known as the Beveredge Belle, as shown in book "1," page 547, in the Recorder's office at Independence, Calif.

That on July 29th, 1907, we discovered and located the claims known as the Golden Rule No. 1, as shown in Book "6," page 578, in the Recorder's office at Independence, Inyo County, Calif.

That on July 29th we further located the claim known as the Protection No. 1, as shown in the records of the Recorder at Independence, Inyo County, Calif.

That we also located and discovered at and during this period of time the claim known as the Braca

Bronco, a record of which I have not now in my possession.

That at no time from the beginning of this agreement prior to August, 1907, was Kate J. Wells on the claims now in the County of Inyo, Calif., but that sometime about the 1st of August, 1907, or during that month, she arrived from Los Angeles and made her first appearance on the hill.

That Harold E. Robinson arrived on the Hill during the month of June, 1907, and was not in any way connected with this agreement nor in the location of these claims.

That at no time for several years prior to our arrival on the hill as stated was any of these claims located by myself or any one of the present occupants, in whose names they appear.

That during the location of the Kate J. claim there arose quite an argument between Kate J. Wells and Burgess Robinson and I said this is too much for me so I started for the Camp to get away from the argument and in going over the ground I remember stamping my foot over an outcrop and kicked off a piece of the rock and upon examining the same I found it to be well mineralized and that when they arrived at the Camp after making up I said to them while you folks were fussing I made a discovery and showed it to them and they went up in the air about it and we then went back and located the claim and did some work on it.

That to my certain knowledge in this case the loca-

tion notice was dated back to suit the occasion and the circumstances.

That all claims were located in the names of Kate J. Wells, Mrs. A. W. Wells and Burgess Robinson, my name not appearing on any of them, and that in every instance where the name appears as Mrs. A. W. Wells I personally wrote the location notice myself.

That in making this statement to you I have not been offered nor have I received any remuneration of any kind from either of you, and it is only done with the intent and purpose of putting you in a proper position to secure your rights under the agreement on the hill, to which so far you have been wrongfully detained.

And further that I will be willing and will at any and all times make oath to the effect that every word here is true, if called upon to do so, and will appear in any court of record and give the facts as they exist to my best recollection and belief.

Yours truly,

(Signed) A. W. WELLS.

POINTS AND AUTHORITIES.

This letter contained the declarations of Wells, who had entered into a grub-stake contract with appellant Turner and Creel. He was a party to the conspiracy to defraud Turner and Creel. All of the transactions were peculiarly within his knowledge; the declarations were against his pecuniary interest as well; the declarations were calculated to incriminate him under the penal laws of the state, and the witness A. W. Wells

was, at the time these declarations were offered, dead, the concurrence of all of which conditions render this testimony absolutely competent and the evidence sufficient to warrant a decree in favor of the appellant.

As was said by the Supreme Court of Illinois:

“This rule has been stated to be ‘that one of the exceptions to the rule excluding hearsay evidence is the case of declarations of a deceased person having peculiar means of knowing a fact, made against his pecuniary interest, the law being that such declarations are admissible even in suits in which neither such deceased person nor anyone claiming under him was or is a party, provided such deceased person could have been examined in regard to the matter in his lifetime.’”

Friberg v. Donovan, 23 Ill. App. 62.

And by the Supreme Court of the state of New York:

“To the same effect, *White v. Chouteau*, that ‘It has long been settled as one of the exceptions to the general rule excluding hearsay evidence that the declarations of a person, since deceased, against his interest, as well as of other incidental and collateral facts and circumstances contained in it, are admissible in evidence, irrespective of the question whether any privity existed between the declarant and the person against whom it is offered, provided the declarant had peculiar knowledge or means of knowing the matter stated, that he had no interest to misrepresent it, and that it was opposed to his pecuniary or proprietary interest.’”

McDonald v. Wesendouck, 30 Misc. Rep. 605,
62 N. Y. Supp. 764;

White v. Chouteau, 1 E. D. Smith, 497.

J. F. Creel, a witness for plaintiff, testified that he wrote this letter at the request of A. W. Wells and that Wells signed it, as follows:

“I next saw Wells about the 10th or 11th of February, 1912. I went to see him at Turner’s request, and met him at Lone Pine, California, and had a conversation with him in relation to the manner in which he had carried out his grub-stake contract with us. I identify the instrument shown me [Plaintiff’s Exhibit “L,” Transcript pages 47 to 53]. It was written by me and signed by A. W. Wells.”

This evidence was uncontradicted by defendants.

Defendant Kate J. Wells admitted that she knew that her husband, A. W. Wells, was working on the grub-stake contract for plaintiff and Creel, as testified to by Creel as follows:

“I am acquainted with Mrs. Wells, I met her in 1908, and had a conversation with her * * * in relation to the claims in controversy, and she said, ‘Creel, I want to tell you that one corner of your Don Creel claim overlaps my Beverage Bell,’ and I replied, ‘Mrs. Wells, I don’t know anything about that, the monuments on the Don Creel or any of the rest of the claims, Mr. Wells located these claims, and you will have to talk with him about that.’ and she replied, ‘Yes, but he did it while he was out for you and Turner.’ She said Wells located the claims while he was out for us.” [Transcript page 60.]

Mrs. Della Miles, a witness for plaintiff, testified:

“In the spring of 1907 Mrs. Wells came to my house and said some parties in Rhyolite, Nevada, had furnished an outfit for Wells and Burgess to go up to the Camp, and she had instructed them to locate everything up there.” [Transcript page 57.]

All of the claims in controversy, with the exception of the Iron Max and the Golden Rule No. 1, were witnessed by A. W. Wells and recorded with the recorder of Inyo county, California, at the request of A. W. Wells. [Transcript pages 49, 50, 51, 52, 54 and 55.]

The written statement of Wells and the oral testimony of the witness J. F. Creel is corroborated in various parts of the testimony as shown by the transcript.

Della Miles further testified that she had a conversation with Burgess Robinson, Mrs. Wells' son, who was since deceased, and who was a privy in interest of Mrs. Wells, as she took by inheritance on his death any interest he might have, in which he said:

“This conversation was along, I should say, the first of September. I came up the 12th of August, 1907, and this must have been about the first of September, after I came there. There had been some trouble down to the Camp, and Burgess came up and said that he was going to get out of there, that Wells and his mother was raising so much fuss that Creel and Turner would come in and take the whole thing anyhow as soon as they heard of it.” [Transcript page 58.]

W. D. Redfield testified:

"I had a conversation with Mrs. Kate Wells in 1909, in which she told me that she was in Los Angeles when Wells and Burgess left Rhyolite, Nevada, and that Burgess was not known in the grub-stake contract with Creel and Turner." [Transcript page 58.]

The statements of Burgess Robinson, being a predecessor in interest of Kate J. Wells, are equivalent to statements by her.

"One of the exceptions to the rule excluding hearsay evidence is, that declarations or statements, whether verbal or written, made by a person since deceased, against his interest, as to facts of which it was his duty to know, are, if pertinent to the matter under investigation, admissible in evidence as between third persons, whether made at the time of the occurrence of the fact declared or subsequently."

Field v. Boynton, 33 Ga. 239;

Friberg v. Donovan, 23 Ill. App. 58, 62;

County of Mahaska v. Ingalls, 16 Ia. 81;

Hosford v. Rowe, 41 Minn. 248, 2 N. W. 1018;

Baker v. Taylor, 54 Minn. 71, 55 N. W. 823;

Hinkley v. Davis, 6 N. H. 210, 25 Am. Dec. 457;

White v. Chouteau, 1 E. D. Smith 497;

McDonald v. Wesendouck, 30 Misc. Rep. 605, 62 N. Y. Sup. 764;

Peace v. Jenkins, 10 Ired. 355;

Trego v. Huzzard, 19 Pa. St. 441;

Taylor v. Gould, 57 Pa. St. 153;

Gilchrist v. Martin, Bailey Eq. 492;

Conger v. Daniel, McMull. Eq. 157.

“Verbal declarations are receivable in evidence in an action between third parties, when accompanied by the following pre-requisites:

1. The declarant must be dead; 2. The declarations must have been against the pecuniary interest of the declarant at the time it was made; 3. The declarations must be of a fact in relation to a matter concerning which the declarant was immediately and personally cognizable; and, 4. The court should be satisfied that the declarant had no probable motive to falsify the fact declared.”

The County of Mahaska v. Ingalls, 16 Ia. 81.

“In the District Court the plaintiff moved to set aside the report of the referees, because on the trial before them they had admitted improper testimony. This motion was overruled and the plaintiff excepted, and this is the only point which his appeal presents. It appears from the bill of exceptions that on the trial before the referee, the defendants, for the purpose of showing that the defalcation, if any existed, had occurred before the execution of the bond in suit, introduced as a witness one John White, who testified that he had a conversation with Shoemaker before his death, and about the 20th day of August, 1858 (which it will be observed was prior to the execution of the bond in suit), and with regard to the condition of the public funds.

Against the plaintiff's objections the witness was permitted to testify as follows: ‘Mr. Shoemaker told me that there was over \$2,000 in the summer of 1858, that he was behind as treasurer of the county, and he wanted an arrangement made by which I should pay it. I agreed to fix it up, if

Moreland would secure me. I afterwards saw Moreland, and he agreed to do so, but never did it, and the agreement was not perfected. This conversation was about August 20, 1858.'

Against the plaintiff's objections, likewise, one Coolbaugh was permitted to testify 'That the said John H. Shoemaker, in the summer of 1858, said, in the presence of Coolbaugh, that he, the said Shoemaker, was behind with the county of Mahaska in the sum of about \$2,700.'

The materiality and decisive importance of this testimony are apparent from the statement of the case above given, and from the report of the referee and the judgment of the court thereon; and whether this cause shall be examined or reversed depends solely upon the admissibility in law of this evidence.

The question which thus arises upon the record is one which has never before been presented to this court."

Mahaska Co. v. Ingalls, 16 Ia. 84, 85.

"The inquiry, then, as to the state of the Shoemaker accounts, at and before the time the bond in suit was executed, was one of indispensable importance. It may be inferred from the report of the referees that his official books and papers threw no light upon this subject. In this exigency the sureties offered the testimony of which the plaintiff now complains. This testimony consisted of verbal admissions of their principal on two separate occasions, and to two different persons, prior to the execution of the bond in suit, and that he was behind, as treasurer of the county, in the sum of about \$2,700.00. And here it is material to be noted that these declarations, or, more properly

speaking, admissions, are distinctly and unequivocally stamped with the following marked features:

‘1st. They were made against the pecuniary interests of the declarant, for they were of such a nature, so circumstantial and precise, as to constitute in an action against him by the plaintiff, the foundation and evidence of a legal liability to that extent.

2nd. They involved, moreover, the admission of conduct on his part, which would render him, if known, infamous in the eyes of the law; for the penal statutes of the state declare that every officer who shall unlawfully ‘take, convert, invest, use, loan, or fail to account for, any portion of the public money entrusted to him, shall be imprisoned in the penitentiary, fined in a sum equal to the amount embezzled, and be also disqualified from holding any office under the laws or constitution of the state.

3rd. They were not only made *ante litem motam*, but were made long prior to the execution of the bond in the suit, and consequently without any reference to the controversy which has since arisen.

4th. The declarant was dead at the time these admissions were offered and received as evidence in an action between third parties, viz., between the county and his sureties.’

Such were the circumstances and nature of these admissions, and now the questions recur, were they competent and legal evidence.

If these same facts had appeared by written entries or statements, the deceased party being in a position to know the facts, and the facts being

undeniably adverse to his interest, there is no question as to their being receivable in evidence.”

County of Mahaska v. Ingalls, 16 Ia. 86-7.

The written declarations of Wells were not only against his pecuniary and proprietary interests, but were such as would subject him to penal consequences, which would add to its weight, conceding his statements to be true, for he was guilty of embezzlement under the California statutes by the appropriation to his own use of the money held by him in trust for the benefit of Creel and Turner. In reference to the admission of testimony of this character, it was said by the Supreme Court of Iowa, in examining the case of Mahaska County versus Ingalls, 16 Iowa 81, as follows:

“In an action against a county treasurer for failing to account for certain moneys collected as taxes, the declarations to a third person, of an assistant in the office employed by the board of supervisors, and who had since deceased, to the effect that he had converted money received for taxes to his own use and falsified the books to conceal this defalcation, were held admissible on the part of the defendant.”

“The respective counsel have ably discussed the question of the competency of this testimony in the light of principle, and the numerous adjudicated cases bearing upon it. The question, however, underwent a careful and elaborate examination by the court in Mahaska County versus Ingalls, 16 Ia. 81, in an able opinion prepared by Dillon, J., in which the authorities cited by counsel

and others were referred to, and some of them reviewed. It was held that such testimony was competent. We say *such* testimony because there, as here, the declarant was dead; the declaration was otherwise admissible by the testimony of a witness who heard them."

Scott Co., vs. Luke, 34 Ia. 317-322.

It is submitted that having shown that Mrs. Wells knew of the grub-stake contract between Wells, Creel, Turner and Burgess Robinson; that Creel and Turner were furnishing the provisions, tools and conveyances and that Wells and Burgess Robinson had located the claims in question in the name of Kate J. Wells while they were working under the grub-stake contract, thereby defrauding Turner and Creel, the declarations and statements of A. W. Wells, corroborated, as they are, by the statements of Burgess Robinson, against interest, uncontroverted and unexplained, are sufficient in law to establish the conspiracy.

For these reasons it is contended that the defendants fraudulently withhold from the plaintiff, T. F. Turner, a two-thirds interest in and to the mining claims which are the subject of this controversy, and which are described in complainant's second amended bill of complaint, and if substantial justice is to be done by the enforcement of the too plain principles of the law, the decree should be in favor of complainant-appellant.

Respectfully submitted,

WM. B. OGDEN,

RALPH E. ESTEB,

Solicitors for Complainant-Appellant.

No. 2798.

United States
Circuit Court of Appeals

NINTH CIRCUIT.

T. F. Turner,

Appellant,

vs.

Kate J. Wells and Ironsides Mining,
Reduction and Leasing Com-
pany, a corporation,

Appellees.

BRIEF OF APPELLEES.

Appeal from the United States District Court
for the Southern District of California, North-
ern Division.

S. E. VERMILYEA,
S. L. CARPENTER,
1101 Hibernian Building,
Los Angeles, California,
Solicitors for Appellees.

Filed

OCT 2 - 1910

F. D. Monckton

No. 2798.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

T. F. Turner,

Appellant,

vs.

**Kate J. Wells and Ironsides Mining,
Reduction and Leasing Com-
pany, a corporation,**

Appellees.

BRIEF OF APPELLEES.

A. W. Wells, who signed the writing upon which the appellant relies, was the husband of Kate J. Wells, appellee and principal defendant, the other appellee being her lessee. They intermarried on April 20, 1900, and the relation continued until his death in September, 1914. When the writing was first offered in evidence it was objected to by appellee on divers grounds, but was admitted by the court "solely for the purpose of showing the existence of the grubstake contract." [Tr. p. 53.]

Later, the writing was again offered “for all purposes” and was again objected to on the following grounds:

1. That it was not admissible against the wife of A. W. Wells without her consent.
2. That it was not admissible as the declaration of a conspirator, no conspiracy having been shown.
3. That assuming that a conspiracy had been shown, it was a declaration made long after the object of the conspiracy had been accomplished, and was merely a narrative or history of a past event and not admissible against a co-conspirator.

The court sustained the objection on the third ground. [Tr. pp. 62, 63.]

The court prefaced the decision of the cause a day or two later by stating that he had concluded to admit the writing for all purposes. [Tr. p. 76.]

This statement of A. W. Wells was not competent evidence for any purpose.

Subdivision 1 of section 1881, Code of Civil Procedure of California, reads as follows:

“1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceedings by one against the other, nor to a criminal action or proceedings for a crime committed by one against

the other; or in an action brought by husband or wife against another person for the alienation of the affections of either husband or wife or in an action for damages against another person for adultery committed by either husband or wife.”

It is too clear for argument that had A. W. Wells been alive at the time of the trial, he would not have been competent to testify in this cause without the consent of appellee, Kate J. Wells.

“The declarations of husband and wife are subject to the same rules of exclusion which govern their testimony as witnesses.”

1 Greenleaf on Evidence (16 Ed.), Sec. 341;

Dawson v. Hall, 2 Mich. 390, 395;

State v. Burlingame, 146 Mo. 207, 225.

In *Gardner v. Klutts*, 8 Jones’ Law, 375, 80 Am. Dec. 331, the Supreme Court of North Carolina disposes of this question in this way:

“A wife is not a competent witness for or against her husband. * * * It follows that her declarations cannot be evidence for or against him; otherwise more weight is given to what she says when not on oath, than to what she would say on oath, which is absurd.”

And the Supreme Court of Indiana, as follows:

“If a husband cannot testify against his wife as a witness, much stronger are the reasons why his statements without oath should not be received against her.”

Kingen v. State, 50 Ind. 557.

“It would seem to follow, as a necessary conclusion, from the incompetency of the wife to testify for her husband under the sanctions of an oath, that her unsworn declarations could not be proved by a third party and in that way made evidence.”

Karney v. Paisley, 13 Iowa 89, 92.

To the same effect are

Kinnemer v. State, 66 Ark. 206;

Tackett v. May, 3 Dana 79;

Dubois v. Ferrand, 8 La. Ann. 373.

That this written statement of A. W. Wells was not admissible as the declaration of a conspirator is equally well settled. No conspiracy was shown and if there had been it was but a narrative of past events and not a declaration in furtherance of a conspiracy while the same was in progress of accomplishment.

“The court went too far in admitting testimony on the general question of conspiracy.

“Doubtless in all cases of conspiracy the act of one conspirator in the prosecution of the enterprise is considered the act of all and is evidence against all. * * * But only those acts and declarations are admissible under this rule which are done and made while the conspiracy is pending and in furtherance of its object. After the conspiracy has come to an end, whether by success or failure, the admission of one conspirator by way of narrative of past facts are not admissible in evidence against the others.”

Logan v. United States, 144 U. S. 263.

In view of the foregoing, it is respectfully submitted that in disposing of this appeal the written statement of A. W. Wells should be wholly eliminated from consideration as a part of the evidence.

There is substantial conflict in the evidence. See testimony of Kate J. Wells [Tr. p. 63 *et seq.*] to the effect that B. T. Robinson, her son, and she had been in this district a number of times prior to 1907; that they knew the ground and that her son, the locator of these claims, was there in 1907 under an agreement with her, she furnishing the supplies.

The decree of the court below dismissing the bill was, of necessity, an implied finding of the facts against the appellant. While such finding is not conclusive on this court, nevertheless, where "the record discloses a serious conflict of testimony and the court below might well have dismissed the bill solely for failure to establish the facts upon which the claim for relief is based, a decree of dismissal will be affirmed."

Hewitt v. Campbell, 109 U. S. 103 (syllabus).

Respectfully submitted,

S. E. VERMILYEA,

S. L. CARPENTER,

*Solicitors for Appellees, Kate J. Wells and Ironsides
Mining, Reduction and Leasing Company.*

No. 2798.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

T. F. Turner.

Appellant.

vs.

Kate J. Wells and Ironsides Reduction and Leasing Company,
a corporation,

Appellees.

REPLY BRIEF OF APPELLANT.

Filed

OCT 5 - 1916

F. D. Monckton

WM. B. OGDEN,
RALPH E. ESTEB,
Solicitors for Appellant.

No. 2798.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

T. F. Turner.

Appellant.

vs.

**Kate J. Wells and Ironsides Reduction and Leasing Company,
a corporation,**

Appellees.

REPLY BRIEF OF APPELLANT.

Counsel for appellees rely upon section 1881, Code of Civil Procedure of California, as a ground for the exclusion of the written declarations of A. W. Wells. This section is copied in full on page four (4) of appellees' brief.

Wells was not offered as a witness, and consequently not "examined," and the code merely declares that either of the spouses cannot be "examined" in an action or proceeding against the other, but does not render their statements elsewhere given privileged against

being shown by competent testimony, plaintiff is not precluded from proving the statements or declarations of the other (if otherwise admissible) by the testimony of a witness who heard them.

Section 1322 of the Penal Code of California provides *inter alia*:

“Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties except with the consent of both * * *.”

The Supreme Court, in construing these two sections, 1881 of the Code of Civil Procedure and 1322 of the Penal Code, has said:

“The provisions of the code (Code Civ. Proc., Sec. 1881 (1); Penal Code, Sec. 1322) prohibiting a husband or a wife from being examined as a witness for or against the other, except with the consent of both, does not preclude the people, in a criminal proceeding against either of the spouses, from proving the statements or declarations of the other (if otherwise admissible) by the testimony of a witness who heard them. The code merely makes either spouse incompetent as a *witness* in an action or proceeding against the other but does not render their statements elsewhere given privileged against being shown by competent testimony.”

People v. Chadwick, 87 Pac. 384, 389 (followed in *People v. Swaile*, 12 Cal. App. 192, 195).

In 4 Jones' Commentaries on Evidence, Sec. 746, in discussing section 1881 of the California Code of Civil Procedure, in note 69, the writer says:

“In California it has been held that neither the provisions of section 1881 of the Code of Civil Procedure, relating to privileged communications between husband and wife, nor those of section 1322 of the Penal Code rendering the wife incompetent to testify against her husband in a criminal case, were violated by the introduction in evidence of a letter written by the husband to the wife.
* * *”

People v. Swaile, 12 Cal. App. 192, 195, 107 Pac. 134 (following People v. Chadwick, 87 Pac. 384, 389).

In that case the court said:

“The statement introduced by the letter is that of the husband, and there was no examination of the wife as to a privileged communication, nor was she examined as a witness against her husband.”

People v. Swaile, 12 Cal. App. 192, 195;
People v. Chadwick, 4 Cal. App. 63, 72;
4 Jones' Commentaries on Evidence, Sec. 746,
n. 69, p. 474.

“While the problem here considered is a matter of first impression in California, this court declared years ago in favor of the liberal construction of section 1322 of the Penal Code and the admission of testimony not clearly excluded by its terms.”

People v. Loper, 159 Cal. 13.

In *People v. Langtree*, decided in 1883, the court in bank adopted with approval the following language of Mr. Schouler:

“On the whole, the prevailing tendency of late years in both England and America is to regard the domestic confidence or the ties of a spouse as of little consequence compared with the public convenience of extending the means of ascertaining the truth in all cases; such facilities being increased, it is believed, by hearing what each one has to say, and then making due allowance for circumstances affecting each one’s credibility.”

People v. Langtree, 64 Cal. 256, 30 Pac. 813;

People v. Loper, 159 Cal. 13, 14;

Schouler on Husband and Wife, 85.

“It will be noticed that, construing section 1322 of the Penal Code and section 1881 of the Code of Civil Procedure together, the inhibition of testimony extends to communications made by one to the other. Mental condition is not a matter of communication and in view of the broad rule adopted in *People v. Langtree*, we are constrained to hold that the testimony of this witness was admissible.”

People v. Loper, 159 Cal. 14.

In general, the rules of evidence are the same in civil and criminal cases.

U. S. v. Gooding, 12 Wheat. 469;

Nudd v. Burrows, 91 U. S. 289.

The trial court took this view of the construction of this statute and admitted the declarations of Wells.

It is unnecessary to comment on any of the authorities cited by appellees as they are not applicable in the face of an absolute determination of the construction to be placed upon section 1881, Code of Civil Procedure of California.

But for a greater reason should the declarations of A. W. Wells be admitted, being as they are “on the foot of the fraud” and this *ex necessitate rei*.

“Any communication between husband and wife while they are engaged in the perpetration of a fraud are not privileged, but may be given in evidence. Thus, in an action against a husband and wife to set aside a fraudulent conveyance from the former to the latter, the negotiations between them prior to the conveyance relative to the consideration are admissible in evidence.”

Beitman v. Hopkins, 109 Ind. 177.

“In Henry v. Sneed (99 Mo. 407) it was decided that ‘In a suit to enjoin the enforcement of a deed of trust securing upon the wife’s land certain notes given by the husband in a transaction for the sale of property induced by fraud, the husband may testify as to conversations had with the tort feasers, and the husband and wife may testify as to conversations between themselves as to the transactions, as part of the *res gestae*, and also on the ground of fraud, and this *ex necessitate rei*. And the party who uses a husband as a mere conduit to convey his fraudulent schemes to the ears of a wife will not be allowed, when the conversations thus induced between husband and wife are offered in evidence in order more fully to unearth his fraud, to interpose the technical objection that, being conversations between husband and wife, they are therefore inadmissible.’ In addition, the court said: ‘In the present case, Sneed attempted to take advantage of a legal technicality as to conversations between husband and wife, to prevent the full extent of his fraud

from being unearthed. Now, in view of the other facts in evidence, it would be simply monstrous to permit a party to take advantage of his own wrong, and assist his own fraud by such an objection. The rule he invokes as to confidential communications between husband and wife was intended to subserve a very wise, wholesome, and holy purpose, but never to further such an end as that for which he invokes it. And this exception to a general rule should certainly have place in a court of equity, which will throttle fraud in all its protean manifestations. We will therefore rule that the testimony of both husband and wife was, *ex necessitate*, competent as to their conversations on two grounds: that those conversations were a part of the *res gestae*, and on the foot of the fraud.'

"A communication made by a husband to his wife respecting trust property which it is their joint duty to carefully preserve and surrender to the owner when lawfully entitled to it is not confidential, within the meaning of the law relieving husband and wife from any obligation to disclose any confidential communication made by one to the other during marriage."

Wood v. Chetwood, 27 N. J. Eq. 311;

Commonwealth v. Sapp, 29 Am. St. Rep. 422-3.

We do not believe that appellees have answered our argument, and insist that the decree should be in favor of appellant.

Respectfully submitted,

WM. B. OGDEN,

RALPH E. ESTEB,

Solicitors for Appellant.

No. 2798

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

T. F. Turner,

Appellant.

vs.

Kate J. Wells, et al.,

Appellees.

PETITION FOR REHEARING.

WM. B. OGDEN,

RALPH E. ESTEB,

Solicitors for Complainant-Appellant.

Filed

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

JAN 29 1917

F. D. Monckton
Clerk

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

T. F. Turner,

Appellant.

vs.

Kate J. Wells, et al.,

Appellees.

PETITION FOR REHEARING.

*To the Honorable Judges of the United States Circuit
Court:*

The undersigned, Wm. B. Ogden and Ralph E. Esteb, solicitors for complainant and appellant, T. Frank Turner, sheweth unto Your Honors that, feeling himself aggrieved by the opinion and decision of Your Honors entered in this cause on the 8th day of January, 1917, respectfully ask that the opinion and decision filed herein be set aside and a rehearing granted herein, upon the grounds and for the reasons hereinafter set forth, humbly submitting to such orders as the court may make, if this application should be found to be without merit:

I.

Upon the ground that Your Honors, inadvertently, and being misled by the decision of the lower court incorporated in the record, in rendering your decision, considered the effect of evidence not introduced or given at the trial of the suit in the court below, the same being evidence which was before the lower court only upon a petition for rehearing based upon newly discovered evidence, and not a part of the record on appeal, nor considered by the lower court at the trial or in making its decree on the merits. The evidence referred to is the letter from Wells to Wilson, strongly relied upon by this court to show that Wells furnished Burgess Robinson his (Wells') own money for his (Robinson's) expenses while locating the claims, and to show an inconsistency between that letter and the statement of Wells to Turner and Creel in his letter to them and to detract from the weight to be given to his testimony therein contained. But it is to be remembered that even on the date of that letter, which was a letter addressed to an attorney whom he hoped would undertake a retainer from him, *that he was still prosecuting his plan to defraud Turner and Creel* and to recover for himself the interest which he had secretly buried beneath the name of his wife. But it, even, is not inconsistent with the contention of the appellant, for, to all intents and purposes, the money paid by Turner and Creel became and was "his (Wells') own money," for the purpose of acquiring these or any locations, in the interest of the partnership.

If the court desires to consider the evidence contained in the Wilson letter as part of the evidence in this case, then we respectfully submit that it should order up the entire record on the rehearing, for the purpose of considering the whole of the evidence, as it is manifestly unfair to the appellant to consider a part of it, without considering the whole, and especially only parts selected by the *nisi prius* judge in giving his reasons for refusing to grant the rehearing. This appeal was not taken upon the ground of the refusal of the lower court to grant a rehearing, and no assignment of error is made therefor, and the evidence presented in the application for a rehearing is not set forth in the record and has no place in this appeal and especially should it not be considered on this appeal when it was never entertained by the lower court as a part of the case when on trial. If, however, the court feels warranted in considering any part of this newly discovered evidence set forth in the *nisi prius* application for rehearing, it should order all of the evidence set forth in that application sent up so that it may have before it and give due consideration to all of that evidence, and not to garbled parts thereof.

II.

Upon the ground and for the reason that the statement in the opinion, that Mrs. Wells furnished an outfit for Burgess Robinson "to go into the district" is inconsistent with the first well-established point as declared by this court, namely: That Wells took Burgess

Robinson with him under the Turner-Creel grub-stake from Rhyolite, Nevada, to the place where the claims were located; that he went to the district from Rhyolite at the expense of and under the contract with Turner and Creel is well established by the testimony of a disinterested witness, Mrs. Della Miles, as to statements made by Mrs. Wells in the spring of 1907 [Trans. p. 57]. Mrs. Wells in her own testimony only claimed that she furnished Robinson with supplies after he arrived in the district, and it is not inconsistent, we think, to assume, under the circumstance, that the rich discoveries were the inducement for the pretended changing of the source of supplies after arrival.

That Wells for a long time had been incapacitated for work by rheumatism, was without money, and lived on the charity of Turner and Creel, contributing nothing to his keep or the outfit, is also beyond question. That Burgess Robinson also lived for a period with Turner and Creel and contributed nothing to his keep or the outfit, is also beyond controversy. These facts, in themselves immaterial, perhaps, go to corroborate Wells' written statement, and absolutely disprove that Mrs. Wells outfitted Burgess Robinson.

III.

Upon the ground and for the reason that it is held in the opinion that Burgess Robinson was acting in a "dual capacity," which, under the facts in this case, is an impossibility, as he could not comply with the terms of his agreement to act with Wells and at the same time act for Mrs. Wells in the same capacity and

deprive appellant of the benefits thereof, neither could Wells become the assistant of Robinson and deprive appellant of his right to have Robinson assist him and by this juggling of words do that which honest men and courts declare to be a breach of trust. As was so aptly said by Mr. Justice Field, in *Kimberly v. Arms* (129 U. S. 506; 32 L. Ed. 770):

“Neither by open fraud nor concealed deception, nor by any contrivance masking his actual relations to the firm, can a member of it, or an agent of it, be permitted to hold to his own use acquisitions made in disregard to those relations, either as partner or agent. In this statement of their duties we are repeating doctrines of common knowledge which will be found fully set forth and illustrated in approved treatises on partnerships and agency and in the adjudications of the courts.”

IV.

Upon the ground and for the reason that it is in effect held in the opinion that because Burgess Robinson actually posted the notices and that the notices contained his name and that of another, that this could not be a location by Wells, notwithstanding their agreement to locate these claims jointly for Turner and Creel. If this were true, if by merely permitting another to actually put up a location notice in his own name, made the latter a locator instead of the former, then an easy road is open by which any trusted agent may deprive his principal of the fruits of the agent's

labor and the principal's capital. We think a long line of decisions in this country establish the point that just such a state of facts will create the wrongdoer, and the recipient of the benefits of the wrong, trustees for the defrauded principal.

V.

Upon the ground and for the reason that in explanation of its position the court says that there can be no question that Burgess was free, so far as any obligation to Turner and Creel was concerned, to make locations, in his own, and his mother's name, and that it is not inconsistent with the record to infer that all the claims in controversy were located by Burgess. Appellant deems that in arriving at this conclusion the court must have failed to consider the fact that all the location certificates were admittedly written, signed and witnessed by Wells and afterwards recorded by him, and it is not inconsistent with the record to assume that he paid for the recording out of money given him by Turner and Creel for the purposes of the grub-stake contract.

The decision then states that the letter was written under a wrongful impression that all claims located by Wells or Burgess would be the property of Turner, Creel and Wells. We believe this to be error, and that the law, rightly applied, would sustain the belief of Wells in that regard.

The decision further proceeds to say that his statement that "we discovered and located" the claims is

not inconsistent with the theory that he assisted Burgess to locate, but if he did so, then they both violated the contract with Turner and Creel, with whom they had agreed that Burgess was to assist Wells, and for this purpose Turner and Creel furnished provisions and money for both of them, with which they admittedly journeyed from Rhyolite to the district where the claims are located. Until Burgess or some one for him had recompensed Turner and Creel for this outlay he was in duty bound to carry out the contract made by him. These are points which, upon the face of the opinion, we submit are contrary to law, but we must not overlook the fact that, according to statement of Wells, which is admitted by the court to be competent, there actually existed a conspiracy between Wells, Burgess and Mrs. Wells as stated in the letter, and that this statement was corroborated by all the surrounding circumstances and the testimony.

VI.

Upon the ground and for the reason that, if we admit, for the sake of argument, appellant failed to connect Mrs. Wells with the conspiracy, or knowledge of the fraud practiced upon us by Wells and Burgess Robinson, yet it remains undisputed that Burgess Robinson had full knowledge of the contract, was a party to it, accepted the benefits coming from Turner and Creel to he and Wells, and *his* interest, at least, is subject to the contract and the trust thereby created. Kate J. Wells succeeded by inheritance to a one-half

interest in the claims, the whole of which interest at least should now be declared subject to the trust. That he knew his guilt is evidenced by his remark to Della Miles, appearing on page 58 of the printed transcript, in which she related:

“This conversation was along, I should say, the first of September, * * * there had been some trouble down to the camp, and Burgess came up and said that he was going to get out of there, that Wells and his mother was raising so much fuss that Creel and Turner would come in and take the whole thing anyhow as soon as they heard about it.”

No stronger testimony in proof of a guilty conscience could be elicited before any court. It is true that this testimony was stricken out upon motion of counsel “as not responsive to the question.” The question was, “You may state what that conversation with Burgess T. Robinson was.” A mere statement of the question, answer and motion discloses the error of the lower court in granting the motion, assigned as fifth assignment of error, and as said by a learned judge upon one occasion, if the statement of the facts in relation to this assignment of error would not convince one of the error complained of, no argument of ours would bring about conviction. If upon the presentation of this appeal to the court, we did not specifically urge this assignment of error, it was for the reason that the error complained of was so apparent to appellant that no argument was

deemed necessary, and if by reason of our laxity in this regard this Honorable Court has inadvertently overlooked this glaring error, we suggest that a rehearing should be granted for this, if no other, reason.

Accordingly it is respectfully submitted that the case should be reopened and be given further consideration by the court.

Dated Los Angeles, California, January 25, 1917.

WM. B. OGDEN,

RALPH E. ESTEB,

Solicitors for Complainant-Appellant.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

T. F. Turner,

Appellant.

vs.

Kate J. Wells, et al.,

Appellees.

CERTIFICATE OF SOLICITORS.

We, William B. Ogden and Ralph E. Esteb, solicitors for complainant, appellant herein, do hereby certify that we jointly prepared the foregoing petition for a rehearing, and that in our judgment the same is well founded and should be granted; and we further certify that it is not interposed for delay, but to the end that substantial justice may be done, and your solicitors further certify that one of the reasons why this petition is not filed for delay is that the defendant, Kate J. Wells, since the commencement of this cause of action, has been and now is in peaceable and profitable possession of all of the mining claims which are the subject of controversy herein, and that no injunction or other restraining order of any kind has been issued against her in relation to the use or occu-

pation of the same, so that any delay in the transmission of the remittitur or mandate of this court to the lower court could in no wise hinder or delay the defendant, Kate J. Wells, or interrupt the continuity of her peaceful and profitable occupation of the premises which are the subject of this litigation.

In witness whereof, we have hereunto set our hand and seal this 25 day of January, 1917.

WM. B. OGDEN,

RALPH E. ESTEB,

Solicitors for Complainant-Appellant T. Frank Turner.

